[redacted]

TRANSCRIPT OF RECORD

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

No. [redacted] 276

ANDREW WEBB, APPELLANT,

vs.

[redacted], SOUTHERN TRANSFER COMPANY, AND SOUTHERN PACIFIC RAILWAY COMPANY.

[redacted]

[redacted]

[redacted]

(24,978)

(24,978)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 695.

ANDREW WEST, APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Transcript of record from the district court of the United States for the district of Idaho	1
Addresses of counsel	1
Complaint	1
Answer of Edward Rutledge Timber Co.	7
Answer of Northern Pacific Railway Co.	16
Replication to answer of Edward Rutledge Timber Co.	25
Replication to answer of Northern Pacific Railway Co.	26
Stipulation as to abstract of evidence on appeal	27
Abstract of evidence	28
Testimony of Andrew West	28
John Davegio	31
Olaf Edin	33
Andrew West (recalled)	35
W. H. Batting	35
Newton J. Glover	38
John Stevenson	39
Lloyd E. Gilhan	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 3, 1916.

Page

Complainant's Exhibit No. 1—Certified documents by Commissioner of the General Land Office (not set out here) 40
Plaintiff's Exhibit No. 2—Letter, Register to West, August 16, 1905 41
Letter of authorization by West 41
Letter, Pierce to Commissioner, June 9, 1909 43
Letter, Pierce to Commissioner, March 16, 1910 46
Letter, West to Register, September 10, 1912 48
Plaintiff's Exhibit No. 3—Selection list of the Northern Pacific Railway Company 48
Plaintiff's Exhibit No. 4—List of Northern Pacific Railway Company describing anew lands selected by Cœur d'Alene list No. 61 54
Complainant's Exhibit No. 7—Letter, Proudfit, Commissioner, to Kenyon, May 6, 1913 58
Defendant's Exhibit No. 11—Letter, Pierce to Commissioner, June 9, 1909 60
Defendant's Exhibit No. 8—Letter, Richards, Commissioner, to Register, January 5, 1907 62
Defendant's Exhibit No. 12—(Not set out here) 67
Defendant's Exhibit No. 10—Patent to Northern Pacific Railway Company 67
Defendant's Exhibit No. 3—Map 70½
Decision 71
Decree 87
Assignments of error 88
Appeal and allowance 90
Bond on appeal 91
Præcipe for record 93
Citation and service 94
Return to record 95
Clerk's certificate 96
Certificate of clerk to district court of cost of record on appeal 99
Order of submission 100
Order directing filing of opinion, &c 101
Opinion 102
Decree 113
Petition for appeal 114
Assignment of errors 116
Appeal and allowance 120
Bond on appeal 122
Præcipe for transcript of record 126
Clerk's certificate 129
Citation and service 131

No._____

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW WEST, APPELLANT,

VS.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

TRANSCRIPT OF THE RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

INDEX TO PRINTED TRANSCRIPT OF RECORD.

	Page
Answer of defendant, Edward Rutledge Timber Co....	7
Answer of defendant, Northern Pacific Railway Co....	16
Abstract of Evidence.....	28
PLAINTIFF'S WITNESSES:	
Batting, W. H.	35
Daviego, John	31
Edin, Olaf	33
Glover, Newton J.	38
Stevenson, John	39
West, Andrew 28,	35
DEFENDANTS' WITNESS:	
Gilhan, Lloyd	39
Assignments of Error	88
Appeal and Allowance	90
Bond	91
Complaint	1
Citation	94
Clerk's Certificate	96
Decision	71
Decree	87
EXHIBITS:	
Plaintiff's Exhibit No. 1.....	40
Plaintiff's Exhibit No. 2.....	40
Plaintiff's Exhibit No. 3.....	48
Plaintiff's Exhibit No. 4.....	54
Plaintiff's Exhibit No. 7.....	58
Defendants' Exhibit No. 3.....	70½
Praecipe	93
Replication to Answer of Edw. Rutledge Timber Co....	25
Replication to Answer of Northern Pacific Ry. Co.....	26
Return to Record	95
Stipulation	27

Names and Addresses of Attorneys.

A. H. KENYON, Spokane, Washington,
MERRITT, OSWALD & MERRITT, Spokane, Washington,
Attorneys for Appellant.
JAMES B. KERR, Portland, Oregon,
STILES W. BURR, Minneapolis, Minnesota,
E. J. CANNON, Spokane, Washington,
Attorneys for Respondents.

In the District Court of the State of Idaho, in and for the First Judicial District.

ANDREW WEST,

Plaintiff,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Complaint.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

III.

That at all times herein mentioned the plaintiff was and now is a citizen of the United States, over the age of twenty-one years, and qualified to enter and acquire title to one hundred and sixty acres of land under the laws of the United States.

IV.

That on or about the 15th day of May, 1903, the plaintiff located and settled upon the Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M., then unsurveyed, situated in the County of Shoshone, State of Idaho, within the Coeur d'Alene Land District, and has ever since continuously resided upon said land, cultivated and improved the same, and is now residing thereon.

V.

That at the time of the location and settlement by plaintiff upon the land above described, the same was vacant, unoccupied and unsurveyed land belonging to the United States, and no claim of right or title to, or interest in, the said lands and premises or any part thereof had then been made by any person, persons, or corporation whomsoever, nor was there any evidence whatsoever upon the said land or premises or any part or parcel thereof, nor in the United States Land Office for the district in which said land was situated, to-wit, in the Coeur d'Alene Land District, nor in the General Land Office in Washington, D. C., showing any claim, right, title or interest by any person, persons or corporation whomsoever, to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession marked or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever; that no person had prior to the location and settlement, of this plaintiff upon said land, nor since said settlement, and to date hereof, ever entered upon the same or attempted to locate or reside thereon, or on any part or parcel thereof.

VI.

That on the 17th day of July, 1905, the official plat of the survey of the land and premises hereinbefore described was filed in the local land office in Coeur d'Alene City, Idaho, and on said date the said lands first became open for entry under the homestead laws of the United States, and on said date plaintiff duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office, and thereafter and on the 10th day of May, 1910, said order rejecting the application of the plaintiff to file as aforesaid was approved by the Secretary of the Interior, and the case finally closed.

VII.

That on the 21st day of June, 1901, the Northern Pacific Railway Company filed in the General Land Office its selection list No. 61, which said list contained the following pretended description, to-wit: "The Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M." That at the time of filing said selection list No. 61, said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described; for the reason that at the time of filing same as aforesaid no such survey had been made or attempted. That neither the said Northern Pacific Railway Company or any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now occupied by the plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said list and selection, and which said pretended description was then and there wholly insufficient to locate

or describe the lands and premises thereafter located and settled upon the plaintiff as hereinbefore alleged, or any part or parcel thereof, or any lands in the State of Idaho, or elsewhere, rendering said list and selection by defendant Northern Pacific Railway Company, wholly void and of no force or effect whatsoever.

VIII.

That thereafter on the 10th day of October, 1910, a patent to said land was issued to the Northern Pacific Railway Company, a corporation.

IX.

That plaintiff is informed and believes and therefore alleges the facts to be, that subsequent to the 21st day of June, 1901, and prior to the commencement of this action the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the land and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title to the lands and premises above described.

X.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation, or any agent, servant, attorney, or employee whomsoever of either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 15th day of May, 1903, has been and is now in this plaintiff to the exclusion of all other person, persons or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or

title to the said lands and premises or any part or parcel thereof as against this plaintiff.

XI.

That the action and decision of the local land office rejecting the application of the plaintiff to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 17th day of July, 1905, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the plaintiff by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XII.

That long prior to the said 10th day of October, 1910, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, this plaintiff was and at all times since has been and now is, the owner and lawfully entitled to the patent for and the legal title to said premises and each and every part thereof.

XIII.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the

part of the Northern Pacific Railway Company in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof, and that the Act of Congress of the United States dated March 2nd, 1899, under and by virtue of which the said defendant Northern Pacific Railway Company based the right to select and claim said lands, is unconstitutional and void, and confers no right whatsoever upon said defendant to select or claim said land or any part thereof as against this plaintiff.

WHEREFORE, plaintiff prays that if he be adjudged and decreed to be the owner of the lands and premises herein described, and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for his costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

JOHN H. WOURMS,
Residence and P. O. Address, Wallace, Idaho.
H. W. RICH,
A. H. KENYON,
P. O. Address, Spokane, Wash.
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Andrew West, being first duly sworn says: That he is the plaintiff named in the above entitled action; that he has

read the foregoing complaint, knows the contents thereof, and that the same is true, of his own knowledge except as to those matters stated on information and belief and as to those matters he believes it to be true.

ANDREW WEST.

Subscribed and sworn to before me this 13th day of April, 1912.

(Notarial Seal) CHAS. A. JONES,
Notary Public, Residing at Spokane, Washington.

(Endorsed): No. 3173. In District Court of the State of Idaho, in and for the First Judicial District. Andrew West, Plaintiff, vs. The Edward Rutledge Timber Co., and Northern Pacific Railway Company, Defendants. Complaint. Filed June 5, 1912, at 9:45 o'clock a. m. John P. Sheehy, Clerk of District Court, by L. R. Adams, Deputy Clerk. John H. Wourms, H. W. Rich and A. H. Kenyon, Attys. for Pltf.

(Endorsed): Filed July 13, 1912, at 4 o'clock p. m., A. L. Richardson, Clerk U. S. Courts. By Lawrence M. Larson, Deputy.

Answer of Edward Rutledge Timber Co.

In the District Court of the United States for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Answer of Defendant Edward Rutledge Timber Co.

Now comes the defendant Edward Rutledge Timber Com-

pany, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that

complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in his said bill, viz: the Southeast quarter (SE¼) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho, and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denied that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and

endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complainant's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the district in which said land was and is situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by the defendant Railway Company or this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that, on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Northern Pacific Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C.; that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set

forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated on technical grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual government survey; that on said 21st day of June, 1901, the defendant Railway Company duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the "Mount Ranier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur

d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when com-

plainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land

office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to the de-

fendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Railway Company, whereby the defendant Railway Company, for a valuable consideration paid to it by this defendant, sold the said land to this defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter the defendant railway company did duly convey the said land to this defendant, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER COMPANY,
By Charles A. Weyerhaeuser, Secretary.

Charles W. Bunn,
Edward J. Cannon,
Charles Donnelly,
Grafton Mason,
Stiles W. Burr,
R. L. Black,
Solicitors and of Counsel for Defendant.

State of Minnesota,
County of Morrison.—ss.

Charles A. Weyerhaeuser, came before me personally and being duly sworn on oath deposes and says that he is the Secretary of the above named defendant Edward Rutledge Timber Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as

to those matters therein stated on information and belief, and that as to such matters he believes it to be true.

(Corporate Seal)

CHARLES A. WEYERHAEUSER.

Subscribed and sworn to before me this 29th day of August, 1912.

(Notarial Seal) HERMAN UTSCH,
Notary Public, Morrison County, Minnesota.
My Commission Expires April 30, 1913.

(Endorsed): Filed September 26, 1912, A. L. Richardson, Clerk.

Answer of Northern Pacific Railway Co.

In the District Court of the United States for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a corporation.

Defendants.

Answer of Defendant Northern Pacific Railway Company.

Now comes the defendant, Northern Pacific Railway Company, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things

duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Edward Rutledge Timber Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Washington; with its principal place of business in the City of Spokane, in said State, and on information and belief alleges that previous to the times mentioned in the bill said defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in this said bill, viz: the Southeast quarter (SE¼) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denies that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complaint's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free

from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the District in which said land was and is situated, to-wit: In the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by this defendant as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C., that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by this defendant as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of this defendant's prior selection thereof and in the hope that this defendant's claim to the land might be defeated on technical

grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by this defendant, as its successor, and was then being operated by this defendant; that said land was so classified as non-mineral at the time of actual Government survey; that on said 21st day of June, 1901, this defendant duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainer National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selec-

tions; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, this defendant caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when complainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey

shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time its said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver

in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to this defendant was duly issued, granted and delivered to this defendant in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Edward Rutledge Timber Company, whereby this defendant, for a valuable consideration paid to it by said defendant Timber Company, sold the said land to said last named defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter this defendant did duly convey the said land to said defendant Timber Company, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY COMPANY,
By R. H. Relf, Asst. Secy.
(Corporate Seal.)

Edward J. Cannon,
C. W. Bunn,
Charles Donnelly,
Grafton Mason,
Stiles W. Burr,
R. L. Black,
Solicitors and of Counsel for Defendant.

State of Minnesota,
County of Ramsey.—ss.

R. H. Relf came before me personally and being duly sworn on oath deposes and says that he is the Assistant Secretary of the above named defendant Northern Pacific Railway Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to such matters he believes it to be true.

R. H. RELF.

Subscribed and sworn to before me this 29th day of August, 1912.

(Notarial Seal) W. F. VAN DEYN,
Notary Public, Ramsey County, Minnesota.
My Commission Expires May 11, 1913.

(Endorsed): Filed Sept. 26, 1912, A. L. Richardson, Clerk.

Replication to Answer of Edward Rutledge Timber Company.

In the District Court of the United States, for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Replication to Answer of Defendant, Edward Rutledge Timber Company.

Comes now Andrew West complainant in the above entitled cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say.

That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants is untrue and insufficient.

WHEREFORE, He prays relief as set forth in his original bill.

A. H. KENYON,
H. W. RICH,
JOHN WOURMS,
Solicitors for Complainant.

P. O. Address: 828 Old National Bank Bldg., Spokane, Spokane County, Washington.

(Endorsed): Filed October 15, 1912, A. L. Richardson, Clerk.

By Lawrence M. Larson, Deputy Clerk.

Replication to Answer of Northern Pacific Railway Company.

In the District Court of the United States, for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Replication to Answer of Defendant Northern Pacific Railway Company.

Comes now Andrew West complainant in the above entitled cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say.

That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants is untrue and insufficient.

WHEREFORE, He prays relief as set forth in his original bill.

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In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY,

Defendants.

Stipulation.

The final decree having been entered herein dismissing the Bill of Complaint, and the complainant being about to sue out an appeal to the Circuit Court of Appeals for the Ninth Circuit, from said final decree.

IT IS NOW STIPULATED and AGREED by and between the parties hereto by their respective solicitors, that subject to the approval of the Judge of said court the following shall be taken and considered as the abstract of the evidence in said cause, for the purposes of such appeal, and that the said abstract may be submitted to the Judge of said court upon this stipulation for approval without notice.

A. H. KENYON,
SEABURY MERRITT,
Solicitors for Complainant.
C. W. BUNN,
E. J. CANNON,
JAMES B. KERR,
Solicitors for Defendant Northern Pacific Ry. Co.
STILES W. BURR, and
JAMES B. KERR,
Solicitors for Defendant, Edward Rutledge Timber Co.

In the District Court of the United States, for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY,

Defendants.

Abstract of Evidence.

The complainant Andrew West was called as a witness in his own behalf, and testified:

I was born in Finland. Am thirty-seven years of age, a naturalized citizen of the United States; that since the 15th day of May, 1903, I have been residing on the land in controversy; on the 15th day of May, 1903, I bought the cabin, improvements and rights of John Hanson upon said land for $200.00, and have continuously resided thereon since that time; that I have been off of said lands to work for the purpose of earning some money for periods of one to two months; that I have had no other home or place of residence since that time; at that time there was about fifty square feet of clearing and a little cultivation; there were notices at each corner and a blazed line on all sides of said land at that time; I wrote and posted new notices at the corner of said land. During 1903 I made improvements upon said land by fixing up the house, making a trail and clearing more land; that since said time I have continued to clear additional land during each year and have cultivated and grown crops upon said land during each of said years; I have two and one-half acres in cultivation and four and one-half acres cleared; that I have a barn, house, woodhouse, roothouse and toilet, and fruit trees planted and growing upon said land; the reasonable value of my im-

provements thereon is the sum of $2800.00; it is a very rich dark brown soil and about one hundred (100) acres is suitable for cultivation; the land is covered with all kinds of trees, consisting of white pine, tamarack, yellow pine and seedlings, which timber is valuable as saw-timber; I found the foundation of an old cabin on the southeast quarter and two notices signed by Teat; there were no other blazes or notices of any kind upon said land; I never was informed that the defendants were claiming this land until I tendered my homestead application at the Coeur d'Alene Land Office; that the nearest place where I could trade was at St. Joe, which was twenty-eight miles.

Cross Examination.

I was born in Finland and came to this country January 1, 1901, direct to Wallace, Idaho. I worked in Wallace until the 10th day of May when I went on this homestead; I was looking for land and met John Hanson in Wallace; he was sick and had no money; he told me he would sell for $200.00; he took me to the land and showed me the notice at the southeast corner, and we went along the blazed line a half a mile north and found a notice on that corner, and we turned a half mile west and there was a notice on that corner; we went a half mile south and found a notice there, and then went half a mile east and came to the same corner, and it was blazed all around that square; the notices were dated May, 1902, and signed John Hanson; he did not show me any corners or government lines that had been made by Government surveyors; I looked all over the land to see if anybody else had found it and I did not see any evidence that any other person claimed it. The Hanson house was 14 by 15 feet inside with one window; I built a new house in 1905 and am using the Hanson house for a barn; I declared my intention to become a citizen and took my first papers in the court house at Wallace in April, 1903, and received my citizen papers in Coeur d'Alene on the 17th day

of June, 1905; Hanson left the land on the 15th day of May, 1903, and went to Spokane to see a doctor; I remained on the land until the fall of 1904, except when I went to St. Joe and St. Maries for mail and supplies; during each trip I was never gone away from the land longer than three weeks; I might have been out fifteen or twenty times during that time, and when I could not get a pack horse to carry in supplies I packed them in myself; Ferrell and St. Joe are the two different names for the same post office, which has been my post office all of the time; my house furnished is worth a thousand dollars; the furniture is worth $200.00 and the house $800.00; the house I bought from Hanson is worth $150.00; the root house is worth $100.00; the wood house is worth $50.00; the clearing of the land is worth $300.00 an acre, and I have cleared two and a half acres; I raised eight sacks of potatoes last fall and about a hundred pounds of rutabagas and about a hundred pounds of turnips; I sold about fifty pounds of potatoes last year for three cents a pound. I am not married. When I am off the land I go to Wallace most of the time. If I could not get any outside work I go and work in the mines for a month or two. I left the land after Christmas, in 1904, and worked January and February to the middle of March cutting cord wood between Wallace and Wardner on the hills there; I had a contract for 200 cords; I have stayed on this land all through some winters and the snow is from five to seven feet deep, being seven feet this last winter, the deepest I ever saw it; in the middle of winter I can get in to and out from the land. The land is good farming land and anything grows fine on it; this land will be worth just as much after the timber is off as it is with the timber on; I could clear ten or fifteen acres a year if I had a little money to buy a little powder to shoot the stumps out and a team of horses, but I am compelled to spend the little money I earn to pay the expenses and attorneys to prevent the Lumber Company from taking the land from me; I took a stone and

timber claim in 1906 which I paid for and now own, which consisted of 160 acres, described as the northwest quarter of section 26, township 45 north, range 3 east, B. M.; I got $3000.00 from my father's estate in 1905 which I loaned my brother and he bought 160 acres of land in Clarke county, Washington.

Re-Direct Examination.

When the official survey was made the surveyed lines running east and west were 40 rods from my old blazed lines and I was moved 40 rods west after the government survey and about 4 or 5 rods south.

Re-Cross Examination.

The government surveyors ran the north and south line between sections 20 and 21 on July 3, 1903, and I was right there. I was working right there when they came with the line and I got a map down so that I know when the land got surveyed. I never saw the surveyors run any other lines. I was busy working on clearing land, etc. The government surveyors were camped there on Marble Creek about a mile from my house for about a week.

JOHN DAVEGIO, a witness called and sworn on behalf of the complainant, testified as follows:

I am 66 years old; I have resided on Marble Creek for the last twelve or fifteen years on my homestead, which is about two miles distant more or less from Andrew West and is in section 16; I first met Andrew West in May, 1903, when he stopped at my place over night; I was first on his homestead in June 1903; there was a small clearing around his house; he was fixing his house that day; I was there again in September of that year; he was cutting brush and clearing; his garden was growing; he would come to my house often as it was on the trail and whenever a settler went out he would bring in everybody's mail and West would get his at my

place; I have seen Mr. West there during all of the years since 1903 until the fall of 1912; he has built a nice comfortable house in which he has the necessary furniture, also a wood house, root house, and some fence around the place; the land is good soil and good for cultivation when the timber is cleared and most of it can be cultivated. I have proved up on my homestead and have no interest in the result of this litigation.

Cross Examination.

I have proved up and sold out and gone away. I have stayed in there part of the winter sometime, not all the winter; I stayed there late in December many times, and I used to pull out during the December snow there.

Re-Direct Examination.

The first time that I ever heard that the defendants were clearing this land was when we came down to Coeur d'Alene to file in 1905.

Q. Did you ever make any inquiry at the Land Office to ascertain whether there was any claim against this land at any time?

A. I did.

Q. When was that?

COUNSEL FOR DEFENDANTS: You are inquiring as to the West land?

COUNSEL FOR COMPLAINANT: I will not limit it to that; to the lands on Marble Creek in the vicinity of this land including this land.

COUNSEL FOR DEFENDANTS: It seems to me that it is both immaterial and incompetent. He was on section 16, which was a state section and what the land officer told him about the southeast quarter of 20, in controversy with West, is certainly not admissible.

COUNSEL FOR COMPLAINANT: No, but as to this

land in this vicinity in general including this and other land.

COUNSEL FOR DEFENDANTS: All the more immaterial.

The COURT: I am not so clear that it would be material, but I shall overrule the objection and let it go in.

A. Yes, I did.

COUNSEL FOR COMPLAINANT: When was that?

A. That was in 190, in August sometime.

Q. Where did you go and what conversation did you have?

A. I made inquiry of the receiver in the land office here if there was anything against the land up in Marble Creek and I gave him the best description I could and asked him if any claims were being made to that land, and he looked at the record and told me there was nothing on record and said "the land is unsurveyed and subject to squatters' right. The government will protect you until it is surveyed."

I know John Hanson located on the West claim and was living there in the summer of 1902.

COUNSEL FOR DEFENDANTS: I assume, your Honor, that it is understood that all this testimony goes in under the objection which has been made?

The COURT: Yes.

OLAF EDIN, a witness called and sworn on behalf of the complainant testified as follows:

I am now and have been since 1901 living on Marble Creek in section 32, about two miles from Andrew West homestead; I have known Andrew West since the middle of the summer 1903; I was on his homestead in 1901 before anybody was living there, and was there in 1902 when John Hanson was living there; he had a cabin and a little clearing. I have been on West's homestead every year since 1903; the improvements continued to be better and the clear-

ings enlarged. I have seen Mr. West a number of time on his place, my place or on the trail since 1903; there has been a crop raised on the West homestead every year since that time and West has made his home there. His home was furnished and is as good as the average homesteader's house. He built his new house in 1905; it is well furnished, plastered, and papered; there are three or four acres cleared, and probably two acres in cultivation; I have never known of or seen any blazes, lines, monuments, notices, or anything that would indicate that the Railway Company or the Timber Company were claiming the West land by reason of having scripped it; there were no lines or evidences of a survey until the government surveyors came in there in 1903; the only lines prior to that were the blazed lines of the locators; these claims were all marked by having lines blazed around them; I helped run the lines around the West claim in 1901; there were no lines around it or notices posted upon it prior to that time; the line I blazed around this cabin varied from the survey about a quarter of a mile, or nearly a quarter one way, and the other way a few rods.

Cross Examination.

In running these lines we started at Marble Creek; we did not know where we were; we just started and made a certain point and started from there; we paced out these quarter section lines so that they would not be crooked, and we undertook to tie them up to the government lines which had already been run as near as we could. Of course it was an uncertain thing. The nearest government line that had been established when we started in to run these lines was distant about five miles; that line was the northeast corner of township 45, 44, 45, in 3 east, five miles from there; the southwest corner in that township was also set and the exterior lines of that township, 45-3, had been run, and we carried in our lines we carried them in from the south line

of township 45-3. We parcelled out these lands by quarter sections as near as we could bringing it to what would be the government survey but so as not to crowd settlers we might have made them a little larger than the government survey. I first heard about the Northern Pacific scrip in 1905 when I filed.

ANDREW WEST, the complainant, was thereupon recalled as a witness in his own behalf and testified as follows:

I did not own any land on the 17th day of July, 1905, when I made my application to file on my homestead; I made my stone and timber application in the fall of 1906. My brother bought the land in Clarke county, Washington, from Mr. Briggs for $3000.00. I paid for it for him and it was deeded to me for security on September 28, 1908, and I conveyed it to my brother in April, 1912.

W. H. BATTING, called and sworn on behalf of the complainant, testified as follows:

I am the register of the United States Land Office at Coeur d'Alene. I have two tract books here; I have the old tract book and the new tract book transcribed in 1912; the loose leaf tract book is now the official tract book of the office; this was transcribed after our fire of 1911 on account of the condition of the old tract book.

COUNSEL FOR COMPLAINANT: Q. From either of these tract books can you ascertain whether any lands included therein have been classified as mineral or nonmineral in character?

A. Yes.

COUNSEL FOR COMPLAINANT: Q. Does the tract book show any classification as to section 20, township 44 north, range 3 east?

A. No, sir, the even sections are not classified.

COUNSEL FOR COMPLAINANT: Q. Were any even

numbered sections classified in the survey of that township?

A. I cannot answer that at present. I would have to get other records. I will say this though that I have noticed frequently in the record books that entries have been made of classifications of even sections, but I have always disregarded them because they are of no effect.

COUNSEL FOR COMPLAINANT: Q. What?

A. Because they have no effect whatever as to the status of the land.

COUNSEL FOR COMPLAINANT: Q. From the records in your office Mr. Batting, can you determine whether or not any classification as to mineral or nonmineral character has ever been made of this section 20 referred to?

A. Not at present, no. I used to have the original reports of the Commissioner, but they have been destroyed by fire. The official records would now have to be obtained from the General Land Office; that is, that applies to all the classifications in this district made by the Commissioner.

COUNSEL FOR COMPLAINANT: Q. From the records in your office has section 20, township 44 north, range 3 east, B. M., ever been classified as to the mineral or nonmineral character?

A. No, sir.

Cross Examination.

COUNSEL FOR DEFENDANTS: Q. Are you able to ascertain from an examination of the records in your office whether this section or any other even numbered section in that township has or has not been examined and classified by the department with respect to mineral or nonmineral character?

A. No, sir; I would like to explain that I could prior to the fire which destroyed our office in 1911, but not now.

Q. I will ask you to state whether or not it is a fact that the even numbered sections are classified as appears from those records and the odd numbered sections are not?

A. Just the reverse is true.

Q. The odd numbered sections are classified and the even are not?

A. Yes.

Q. But they do classify the odd numbered sections?

A. That is correct.

Q. And do not the even numbered sections; then I will ask you to state whether or not it is a fact that the record is silent upon the subject because the even numbered sections are in no event classified?

A. That is correct; I can explain to you a little further; In the old tract book of our office the classification of 44-3 east was entered at the beginning of the head of a township classified October, 1899, as mineral, approved March 26, 1901, and refers to General Land Office letter. That is the only entry in 44-3 East with reference to mineral or non-mineral classification.

Q. Now I will ask you to state if it is not a fact that the odd numbered sections of that township in your new record are classified as mineral?

A. Yes, all of them. I was going to explain when I started my explanation that the reason that was entered in the beginning of the township was because the classification applies only to odd sections.

COUNSEL FOR DEFENDANTS: The classification you speak of is the classification under the act of February 26, 1895?

COUNSEL FOR COMPLAINANT: We admit now that the records do not show that there was a classification of section 20.

Q. Then the fact that on these records here there is no classification with respect to section 20 does not indicate that there was no return or classification by the surveyor general in connection with the survey?

A. Oh, no; the surveyor general makes a return with respect to every survey, every section.

Q. With respect to whether it is mineral or not?

A. Yes.

Q. And you do not mean to be understood to testify that the records of your office indicate that there was no return on this section?

A. No, not at all.

Re-Direct Examination.

Q. Is there any way for you to tell from any record in your office as to whether the section of land in controversy has ever been classified by the surveyor general?

A. Not in my office at present; I can explain that that when the office was destroyed in 1911 we had those records and after the fire in re-establishing the office I requested that they be duplicated and the surveyor general has done part of the work but not completed it. This particular township has not been duplicated. I have no records of any classification of the original survey of the surveyor general. If I had the field notes I could give you that; they were destroyed by fire. No records of the tract books to which I have referred have been made up from the official plat and the official notes which I had in my office; the surveyor's return as to the character of the land was never entered in the tract book.

NEWTON J. GLOVER, called and sworn as a witness in behalf of the complainant, testified as follows:

I have resided on Marble Creek since 1901; I have known Mr. West since 1903; my homestead is the west half of the northwest quarter of the same section in which Mr. West's homestead is; I first saw him on his homestead in 1903; he was putting in his garden; he has made that his home since that time; he has raised a crop there each year since 1903; I never heard that the Railroad Company claimed this land prior to 1905; I went to the land office in July, 1901, and

made inquiry as to this land; there was nothing in the record about it; it was open for homestead settlement.

JOHN STEVENSON, called as a witness on behalf of the complainant testified as follows:

I live in section 29 adjoining the section in which Mr. West lives; the West land is good agricultural land after it is cleared; there could be 120 acres of it cultivated and farmed.

Defendants' Evidence.

LLOYD E. GILHAN, called as a witness on behalf of the defendants, testified as follows:

I reside in Portland, Oregon; am a timber cruiser and engineer; I have been engaged in the woods in this capacity since 1906, and am familiar with the location of government corners and lines, the taking of elevations and the cruising of timber; in April, 1913, I spent one day on the land claimed by Andrew West, the southeast quarter of section 20, township 44 north, range 3 east, B. M., and spent from April 9 to April 29, inclusive, upon this land and other land in the same vicinity; I made a survey of the southeast quarter of section 20 and took elevations, and by using an aneroid barometer I took the elevations of this land; I prepared the plat marked "Defendants' Exhibit No. 3," which shows the east half of section 20 and the west half of section 21, township 44 north, range 3 east, B. M.; this map correctly shows the elevations of the various points and subdivisions of lands shown on the map; the contour lines on this map are 50 feet apart, that is, each line is 50 feet higher or 50 feet lower than the next line; the highest point shown on the southeast quarter of section 20 is 3650 feet; this point is in the northeast quarter of the southeast quarter of section 20, and the lowest point is an elevation of 3,000 feet, giving a difference in elevation of 650 feet; the distance between the highest

point and lowest point laterally is 1980 feet; the west half of the southeast quarter of section 20 is steep, while the east half of the southeast quarter is practically level; the slope of the ground on the southeast quarter of section 20 runs from ten to forty-five degrees; the land is pretty heavily timbered; it is timbered with white pine and tamarack. In April, 1913, the land was covered with snow from four feet to twenty-five feet deep.

The following documentary evidence was introduced at the hearing of said cause:

There was introduced as COMPLAINANT'S EXHIBIT NO. 1, documents certified as copies by the commissioner of the General Land Office as follows:

1. Homestead application of ANDREW WEST, for the SE¼ of Sec. 20, Twp. 44 North, Range 3 E., B. M., dated July 15th, 1905.

2. Affidavit of ANDREW WEST, under Act of Congress of August 30, 1890, in support of his homestead application, dated July 17, 1905.

3. Homestead affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

4. Non-mineral affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

5. Affidavit of ANDREW WEST, dated July 17, 1905, under Section 2289 of Revised Statutes of the United States, in support of his homestead application.

There was introduced as PLAINTIFF'S EXHIBIT NO. 2 documents certified as copies by the Commissioner of the General Land Office, as follows:

1. Rejection of Homestead Application of ANDREW WEST in words and figures as follows, to-wit:

"01261

Coeur d'Alene, Idaho, August 16th, 1905.

Andrew West,

St. Joe, Idaho.

Dear Sir:

Your application to make entry of SE¼ Sec. 20, Tp. 44 N., R. 3 E., B. M., under the homestead law has been rejected for the reason that all of the lands applied for is embraced in the prior N. P. Ry. Co. list No. 61, Act March 2, 1899, filed June 21, 1901.

Thirty days from the above date are allowed you in which to appeal from the rejection of said application.

Yours truly,

Register."

2. *Letter of Authorization,* in words and figures as follows, to-wit:

"UNITED STATES LAND OFFICE,

Coeur d'Alene, Idaho. 01261

Andrew West,

vs.

Northern Pacific

Railway Co.—Authorization.

I, Andrew West do hereby authorize Messrs. Peacock, Wells & Ludden, to appear and represent me as my attorneys in all matters and things connected with the above entitled case.

ANDREW WEST."

3. *Notice of Appeal* by Peacock, Wells and Luddon, attorneys for Andrew West, to the Commissioner of the General Land Office from the rejection by the Register and Receiver of the Coeur d'Alene Land Office of the Homestead Application of Andrew West.

4. *Affidavit of Service* of Notice and Appeal on Northern Pacific Railway Company.

5. *Letter* from Register of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting appeal of Andrew West from rejection of his homestead application.

6. *Petition* addressed to Secretary of Interior by Andrew West for a review and reconsideration of the decision of the Secretary of the Interior rendered July 24, 1898, adverse to Andrew West, signed by Andrew West and A. G. Kerns, his attorney.

7. *Affidavit* of good faith by Andrew West in support of his petition for review of decision of Secretary of Interior dated December 22, 1908.

8. *Supplementary Affidavit* by Andrew West dated April 20, 1909.

9. *Letter* from Commissioner of the General Land Office addressed to Secretary of Interior transmitting motion of West for review of Departmental Decision dated July 24, 1908.

10. *Letter* from Assistant Commissioner of General Land Office, dated April 29, 1909, to Register and Receiver, Coeur d'Alene, Idaho, stating that a motion for review has been filed in case of Andrew West versus Northern Pacific Railway Company, and directing Register and Receiver to suspend action in the same.

11. *Letter* dated April 29, 1909, from Commissioner of General Land Office to Secretary of Interior, transmitting motion for review of Departmental Decision dated July 24, 1908.

12. *Letter* dated May 13, 1909, from Commissioner of General Land Office to Hon. W. B. Heyburn, setting forth the status of the land covered by Homestead Application of Andrew West rejected for conflict with a prior selection of the tract by the Northern Pacific Railway Company.

13. *Letter* dater May 24, 1909, from Butler and Vale, attorneys, enclosing affidavit and petition for review of Andrew West involving land covered by Homestead Application of West.

14. *Letter* from First Assistant Secretary of Interior to Commissioner of the General Land Office, in words and figures as follows, to-wit:

"K. M. T. 281730-18 G. B. G.
D-7138.

DEPARTMENT OF THE INTERIOR
WASHINGTON.

June 9, 1909.

Andrew West,
v.
Northern Pacific Railway Co.

Motion for Review—Entertained.

Coeur d'Alene 01261
F.

The Commissioner of the
General Land Office.

RECEIVED
JUN 11
1909.

Sir:

This is a motion on behalf of Andrew West for review of so much of departmental decision of September 5, 1908, (erroneously described in the motion as departmental decision dated July 24, 1908,), as affirmed your office decision of January 5, 1907, holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the line of the public surveys, when made, was superior to that of the homestead claimant, West, involving the SE¼ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I

therefore herewith transmit said motion and direct that the same be returned to West, notifying him that it will be considered, provided he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which original selections herein rested; and (2) the allegations that a new base was substituted after the original selection was made, and after West had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

15. *Letter* dated June 25, 1909, from Assistant Commissioner of General Land Office to Register and Receiver directing service of motion for review on Northern Pacific Railway Company.

16. *Letter* dated January 5, 1910, from Kerns and Ryan, attorneys, addressed to Register and Receiver, Coeur d'Alene, Idaho, enclosing proof of service of motion for review on Northern Pacific Railway Company.

17. *Affidavit* of John F. Moffatt, dated January 5, 1910, showing service of petition for review on Northern Pacific Railway Company.

18. *Letter* dated January 10, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office, transmitting proof of service of motion for review on Northern Pacific Railway Company.

19. Argument filed in United States Land Office at Coeur

d'Alene, Idaho, on January 28, 1910, by Kerns and Ryan, attorneys for Andrew West, in support of petition for rehearing addressed to the Secretary of the Interior.

20. *Affidavit* of A. T. Ryan, dated January 26, 1910, showing service of argument in support of petition for rehearing on Northern Pacific Railway Company.

21. *Letter* dated January 31, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting argument on rehearing filed in Coeur d'Alene Land Office on January 28, 1910, by Kerns and Ryan, attorneys.

22. *Letter* dated February 5, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior returning record in the case of Andrew West versus Northern Pacific Railway Company as directed by departmental letter of June 9, 1909.

23. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of the General Land Office to Register and Receiver, Coeur d'Alene, advising that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

24. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Butler and Vale, notifying them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

25. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, advising them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

26. *Letter* dated February 18, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior transmitting letter of Receiver of Coeur d'Alene Land Office of January 31, 1910, enclosing brief filed on behalf of West.

27. *Letter* dated February 23, 1910, from Britton and Gray, to Secretary of Interior, filing reply brief on behalf of the Northern Pacific Railway Company in the case of Andrew West versus said company.

28. *Brief* filed by Britton and Gray, attorneys for Northern Pacific Railway Company, in case of Andrew West versus Northern Pacific Railway Company on motion for review by West of the decision of the Secretary of Interior of July 24, 1908.

29. *Affidavit* of Edward Jackson dated February ....., 1910, showing service of reply brief on A. G. Kerns, attorney for Andrew West.

30. *Letter* from First Assistant Secretary of the Interior to the Commissioner of the General Land Office, dated February 16, 1910, which letter is in words and figures as follows, to-wit:

281730—46

LLB. DEPARTMENT OF THE INTERIOR, G.B.G.
WASHINGTON.

Address only
The Secretary of the Interior. Mar. 16, 1910.
D-7138 FWC

Coeur d'Alene
01261

ANDREW WEST,
v.
NORTHERN PACIFIC RAILWAY CO.

Received
Mar 19 1910.
G. L. O.

Motion for Review Denied.

The Commissioner of the General Land Office.

Sir: This is a motion on behalf of Andrew West for review of departmental decision of September 5, 1908, sustaining the claim of the Northern Pacific Railway Company and rejecting the settlement claim of the said West, for the SE¼ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

This case is in all essential respects the same as the case of August Hanson et al v. Northern Pacific Railway Company, in which a motion for review, filed by Hanson, has been this day denied. For the reasons therein stated, the motion herein is denied, and the papers are herewith transmitted for the files of your office.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

31. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office at Butler and Vale, enclosing copy of departmental decision dated March 16, 1910, denying West's motion for review.

32. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, enclosing copy of decision dated March 16, 1910, denying West's motion for review.

33. *Letter* from Assistant Commissioner of General Land Office, dated March 30, 1910, to Register and Receiver of United States Land Office at Coeur d'Alene, Idaho, transmitting letter of Secretary of Interior of March 16, 1910.

34. *Election* of Andrew West to make proof, in words and figures as follows, to-wit:

"RECEIVED
Sept. 13, 1912 281730—5 01261
U. S. LAND OFFICE
COEUR D'ALENE, IDAHO.

ELECTION TO MAKE PROOF
UNDER LAW UNDER WHICH ENTRY WAS MADE.
Act of June 6, 1912 (Public, No. 179)

Marble Creek, Idaho,
Sept. 10th, 1912

Register and Receiver,
United States Land Office,
Coeur d'Alene, Idaho.

Sirs:

On the 17th of July, 1905, I made Homestead Entry No. ..... for S. E. ¼ Sec. 20, T. 44, N, R. 3 E., Boise Meridian.

Under the privilege allowed by Section 2291, U. S. R. S., as amended by the Act of June 6, 1912 (Public, No. 179), I hereby give notice that I elect to make proof on said entry under the law under which the same was made.

My postoffice address is St. Joe, Idaho.

ANDREW WEST.

There was introduced as PLAINTIFF'S EXHIBIT NO. 3 a document certified as a copy by the Commissioner of the General Land Office, being a selection list of the Northern Pacific Railway Company, which document is in words and figures as follows, to-wit:

ACT OF MARCH 2ND, 1899

Filed June 21, 1901
D. H. Budlong,
Register. Approved June 21, 1901.

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 61 (lieu)
OF SELECTIONS OF PUBLIC LANDS MADE BY THE NORTHERN PACIFIC RAILROAD COMPANY AS INURING TO IT UNDER GRANTS OF JULY 2, 1864, AND MAY 31, 1870, IN THE COEUR D'ALENE U. S. LAND DISTRICT IDAHO.

July 18, 1911	To H. W. Rich and John King by Acting Secy. copy hereto attached. Wood.	Posted July 22-1901 K. L. C. 9-20-10 Base Posted. Van D. o

a-2

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY.
LIST No.
61.

STATE OF IDAHO.
U. S. Land Office at
Coeur d'Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Ranier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act

was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the state of Idaho.

LIST OF LANDS north of base line and east of Boise Principal Meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

	Part of Section	Sec.	Town.	Range	Area Acres-100ths	Remarks
The following tracts of land which when surveyed will be described as follows:						
1	All	14	44	2	640	
2	All	22	"	"	640	
3	W½ NE¼, NW¼, W½ SW¼, SE¼ SW¼, and S½ SE¼	26	"	"	440	
4	W½	6	43	3	320	
5	E½	18	44	3	320	
6	All	20	"	"	640	
7	NE¼	30	"	"	160	
8	NE¼ SW¼ and S½ SW¼	30	"	"	120	
9	E½	32	"	"	320	
10	W½	32	"	"	320	
	TOTAL				3920	Acres

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Part of Section	Sec.	Town. North	Range East W.M.	Area Acres-100ths	Remarks
The following tracts of land which when surveyed will be described as follows:					
1 All	31	18	8	640	
2 All	33	"	"	640	
3 S½ NE¼, W½ & NE¼ SE¼	29	"	"	440	
4 E½	35	"	"	320	
5 W½	35	"	"	320	
6 All	11	13	11	640	
7 NE¼	9	"	"	160	
8 NW¼ SE¼ & S½ SE¼	29	18	8	120	
9 W½	9	13	11	320	
10 S½	31	17	12	320	
	TOTAL			3,920	Acres

State of Minnesota,
County of Ramsey.—ss.

I, Wm. H. Phipps, being duly sworn, depose and say: that I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and all of them, are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to

to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

WM. H. PHIPPS (Seal)

Subscribed and sworn to before me this 17th day of June, 1901. W. F. von Deyn. Notary Public, Ramsey County, Minnesota.

U. S. Land Office at Coeur d'Alene, Idaho,
Jun 21, 1901

We hereby certify that we have carefully examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said

Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty dollars in full payment and discharge of said fees.

D. H. BUDLONG, Register.
C. D. WARNER, Receiver.

The foregoing, Plaintiff's Exhibit 3, was also introduced in evidence by the defendants.

There was introduced as PLAINTIFF'S EXHIBIT NO. 4 a document certified as a copy by the Commissioner of the General Land Office, being a list filed by the Northern Pacific Railway Company describing anew the lands selected by Coeur d'Alene List No. 61 which exhibit is in words and figures as follows, to-wit:

ACT OF MARCH 2, 1899.
Describing anew the lands selected by
Coeur d'Alene List No. 61 (In part)
so as to conform with the United States Survey thereof.
FORM L. D. 153

FILED JULY 31, 1905. Approved.....

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY CO.
LIST NO. 61 (In part).
OF SELECTIONS OF PUBLIC LANDS MADE BY THE NORTHERN PACIFIC RAILWAY COMPANY
As inuring to it under Grants of July 2, 1864
and May 31, 1870, in the
Coeur d'Alene U. S. Land District
IDAHO.

Posted Dec. 16, 1905.

Sept. 21-05 S. W. M.
Item 10, Base Posted Van D. "C"
adj. to survey item 8—Noted Van D. o

WHEREAS, by authority granted by an Act of Congress

entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2nd, 1899, the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, did on the 21st day of June, 1901, select in the United States District Land Office at *Coeur d'Alene*, Idaho, certain lands in *townships numbered 44 north, ranges 2 and 3 east*, Boise Meridian, as described in its *selection list numbered 61*, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the Act of Congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS north of base line and east of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as

the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section		Sec.	Town.	Range	Area Acres-100ths	Remarks
1	All	14	42	2	640	
2	All	22	"	"	640	
3	W½NE¼ NW¼ W½ SW¼ SE¼SW¼ & S½SE¼	26	"	"	440	
4						
5	E½	18	44	3	320	
6	All	20	"	"	640	
7	NE¼	30	"	"	160	
8	NE¼ SW¼	30	"	"	115.14	
9	E½	32	"	"	320	
10	W½	32	"	"	320	
					3595.14	

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

	Part of Section	Sec.	Town. North	Range East	Area Acres-100ths	Remarks
Those certain tracts of land which when surveyed will be described as follows:						
1	All	31	18	8	640	
2	All	33	"	"	640	
3	S½NE¼ W½ & NE¼ SE¼	29	"	"	440	
4						
5	W½	35	18	8	320	
6	All	11	13	11	640	
7	NE¼	9	"	"	160	
8	NW¼SE¼ & S½ SE¼	29	18	8	120	
9	W½	9	13	11	320	
10	E½ SW¼	27	15	11	80	
	N½SW¼ SW¼SW¼ N½SE¼ & SE¼SE¼	33	"	"	240	

The foregoing list designating anew so as to conform with the public surveys thereof the lands selected in

Coeur d'Alene List No. 61 (in part)

was filed in this office by the Northern Pacific Railway Company on the 31st day of July, 1905.

R. N. DUNN,
Register.
C. D. WARNER,
Receiver.

The foregoing Complainant's Exhibit 4 was also introduced in evidence by the defendants.

Thereupon the plaintiff offers in evidence a document in words and figures as follows, to-wit:

COMPLAINANT'S EXHIBIT NO. 7.

No. 552

B 4-207 Filed June 9, 1913
CRGO A. L. Richardson,
Clerk.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE.

WASHINGTON, D. C., May 6, 1913.

I hereby certify that the annexed copy of letter is a true and literal exemplification from the original in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

FRED DENNETT,
Commissioner of the General Land Office.

(United States General Land Office Seal.)

In reply please refer to Coeur d'Alene 01261 "C" RSC

R S C J H D
F R D
D K P

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

WASHINGTON, May 6, 1913.

Address only the
Commissioner of the
General Land Office.

Mr. A. H. Kenyon,
827 Old National Bank Building,
Spokane, Washington.

Sir:

Hon. W. E. Borah, United States Senate, has left at this office a letter which you addressed him April 25, 1913. You

transmitted to Mr. Borah with your letter certified copies of certain papers identified by this office as Coeur d'Alene 01261.

You state that you desire the Commissioner of this office to execute a certificate to be attached to these papers, stating in substance, that they are copies of the complete record in the case of Andrew West for the SE¼ Sec. 28, T. 44 N., R. 3 E., B. M., Idaho.

This office is authorized by statutes to furnish certified copies of books, records, papers, documents, maps, plats, etc., but cannot certify to facts or conclusions. Obviously, it could not certify that a rertain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of a case. It may be stated, however, that the copies furnished you were certified copies of all the papers in the case which are found in the general files of the office.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

5-6-VEW

Thereupon counsel for the defendants interposed the following objection:

"This is objected to upon the ground that it is immaterial, incompetent, and not evidence of the facts therein stated. This is a letter, if your Honor please, addressed to the attorneys for the plaintiff. It says 'This office is authorized by statute to furnish certified copies of books, records, papers, documents, plats, etc., but cannot certify as to facts or conclusions. Obviously it could not certify that a certain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of the case'."

Thereupon the objection of defendants' counsel was overruled and said document was received in evidence.

Documentary evidence was introduced at the hearing on behalf of the defendant as follows:

That certain plat referred to in the testimony of the witness LLOYD GILHAM contained in the foregoing abstract, which was marked DEFENDANT'S EXHIBIT 3, the original of which is returned herewith.

There were also offered in evidence on behalf of the defendants certain decisions in the case of *August Hanson* versus *Northern Pacific Railway Company*, referred to in the decision of the Secretary of the Interior, of March 16, 1910, above set forth, rejecting the motion for review of Andrew West upon the ground that it was controlled by the decision in the case of August Hanson versus Northern Pacific Railway Company.

The decisions in the Hanson case certified as copies by the Commissioner of the General Land Office were marked "DEFENDANT'S EXHIBIT NO. 11," and are as follows:

1. *Letter* from First Assistant Secretary of the Interior to Commissioner of the General Land Office dated June 9, 1909, entertaining a motion for review, which letter is in words and figures as follows, to-wit:

K. M. T. 313136-1A G. B. G.

DEPARTMENT OF THE INTERIOR,

D-578 WASHINGTON. June 9, 1909.

August Hanson, et al.

v.

Northern Pacific Railway Co.

Motion for Review—Entertained.

RECEIVED
JUN 14
1909
G L O

Coeur d'Alene 01259
F

The Commissioner of the
General Land Office.

Sir:

This is a motion on behalf of August Hanson for review of so much of departmental decision of September 5, 1908 (erroneously described in the motion as departmental decision dated July 24, 1908) as affirmed your office decision of January 5, 1907 holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the lines of the public surveys, when made, was superior to that of the homestead claimant, Hanson, involving the W½ SW¼, NE¼ SW¼, and NW¼ SE¼, Sec. 21, T. 44 N., R. 3 E., Coeur d'Alene Land District, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I therefore herewith transmit said motion, and direct that the same be returned to Hanson, notifying him that it will be considered, provided that he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which the original selections herein rested; and (2) the allegation that a new base was substituted after the original selection was made, and after Hanson had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

2. *Letter* dated March 16, 1910, from First Assistant Secretary of Interior to Commissioner of General Land Office, denying motion for review, which letter is reported in the decisions of the Secretary of the Interior in Volume 38, Land Decisions, at page 491.

There was also introduced as DEFENDANT'S EXHIBIT 8 a certified copy of a letter from the Commissioner of the General Land Office to the Register and Receiver at Coeur d'Alene, Idaho, dated January 25, 1907, rejecting the application of Andrew West, which letter is in words and figures as follows, to-wit:

"380-p. 40 313136-1x COPY
"F"

15-14579 DEPARTMENT OF THE INTERIOR
F I W GENERAL LAND OFFICE
WASHINGTON, D. C. January 5, 1907

Address only the
Commissioner of the General Land Office.

Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

The plat of survey of T. 44 N., R. 3 E., was filed in your office July 17, 1905, and on the following day the State of Idaho applied to select, per common school indemnity list No. 4, under section four of the act of July (8) 3, 1890, the E½ Sec. 18, NW¼ NE¼, Sec. 19, all Secs. 20 and 21, W½ SW¼ Sec. 22, W½ NW¼ Sec. 27, all Sec. 28, E½ SW¼, lot 4, and E½ Sec. 30, all Sec. 32, E½ Sec. 33, S½ NW¼ and S½ Sec. 34, which application you rejected because all the lands applied for are embraced in prior selections of the Northern Pacific Railway Company, per lists Nos. 61, 63 and 65. From said rejection the State appealed.

It appears that on June 21, 1901, while the land was unsurveyed said company selected the E½ Sec. 18, all Sec. 20, NE¼ SW¼, S½ SW¼ and NE¼ Sec. 30, and all Sec. 32, per list No. 61. July 1, 1901, selected all Sec. 21, W½ SW¼ Sec. 22, W½ NW¼ Sec. 27, all Sec. 28, E½ Sec. 33, S½ NW¼ and S½ Sec. 34, per list No. 63, and on July 2, selected the NW¼ NE¼, Sec. 19 and SE¼ Sec. 30, per list No. 65, all under the provisions of the act of March 2, 1899 (30 Stat., 597, 628).

A number of homestead applications were presented on the same day the township plat was filed covering lands embraced in the State's application, which were also rejected for conflict with the prior selection of the land by the railway company and from said rejection each applicant appealed, viz.,

George W. Hayes, NE¼ Sec. 18. Settlement and continuous residence alleged since June 1, 1903. Improvements $200.

* * * * * *

Andrew West, SE¼ Sec. 20. Settlement and continuous residence since June 15, 1903. Improvements about $300.

* * * * * *

August Hanson, W½ SW¼, NE¼ SW¼ and NW¼ SE¼ Sec. 21. Settlement and continuous residence since September 14, 1901. Improvements about $400.

* * * * * *

July 31, 1905, the company filed a new list No. 61 and on August 30, 1905, filed new lists Nos. 63 and 65 describing the selected tracts in accordance with the plat of survey as required by section 4 of the act of March 2, 1899, supra.

The company filed a motion to dismiss the State's appeal on the ground (1) that the same was not filed within the time prescribed by the Rules of Practice and (2) it did not describe the lands with sufficient accuracy for the com-

pany to know what particular tracts are included in the case.

Notice of the rejection of the State's application was sent by registered letter on July 27, 1905, and the appeal was filed August 31, 1905. Said appeal was therefore within time. Further, the lands were described as being in T. 44 N., R. 3 E. and while the particular tracts applied for were not designated, it was sufficient notice to the company of the adverse claim asserted by the State. The motion to dismiss is denied.

It is contended that the tracts here in question were classified as mineral lands, and that the company's selection thereof is invalid. It is further claimed in behalf of the State, that the State had an absolute prior right of selection of the lands under the act of August 18, 1894 (28 Stat., 372, 394), extending from the time of the Governor's request for the survey of the land until the expiration of sixty days from the filing of the township plat of survey.

This land is within the indemnity limits of the company's grant under the act of July 2, 1864 (13 Stat., 365), and while unsurveyed it was classified as mineral land by the Board of Land Commissioners appointed under the act of February 26, 1895, during the month of October, 1899, which classification received departmental approval March 26, 1901.

The Board of Land Commissioners were instructed June 25, 1895 (20 L. D., 571) to "examine for the purpose of classification odd-numbered sections within the grant only." The classification of the even-numbered sections was unauthorized and can not be held as effecting their character.

The act of March 2, 1899, supra, authorized the company to select in lieu of the lands relinquished.

"An equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government

survey, which has been or shall be made of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc.

The subdivisional survey of this township was made in July, 1903, and the deputy surveyor who made the survey reported that the land if cleared would be suitable for grazing, but at present is more valuable for its timber. This was clearly a non-mineral return and the classification of October, 1899, can not be considered a classification of the lands as mineral at the time of actual government survey within the meaning of the act of March 2, 1899, supra. See St. Paul, Minneapolis and Manitoba Ry. Co. (34 L. D., 211) construing the act of August 5, 1892, containing a similar provision.

It appears that the Governor of Idaho applied for the survey of T. 44 N., R. 3 E., with a number of other townships, some of which were included in a previous application, that the application was filed in the United States Surveyor General's office at Boise, Idaho, July 8, 1901, and was forwarded to this office July 10, 1901. This application was duly followed by publication of notice thereof within the time prescribed by the act but no withdrawal appears to have been ordered thereon. The reservation under the act of August 18, 1894, was ineffective as to the lands which had been selected by the company prior to the filing of the Governor's application for survey.

The company had the right to select the lands while unsurveyed and after the filing of the township plat it completed its selection within the time prescribed by the act of March 2, 1899.

The company's claim to these lands under its selection, lists 61, 63 and 65, is clearly superior to that of the State and as to those applicants whose claims were initiated subsequent to the filing of the original lists 61, 63 and 65.

Accordingly your rejection of the State's application to select and of the homestead applications of said Hayes, Johnson, Nystrom, Strobel, West, David, Hanson, Risley, H. R. Estes, Rising, H. E. Estes, Curtis, Logan, Perkins, Edin, Dobbins and Mandell, so far as they cover lands embraced in said State's application is hereby sustained, subject to the right of appeal.

With regard to the claims of said Glover, Root, Thereiault, Cheney, Scheave, Stoddard and Davies, the applicants submitted affidavits duly corroborated, alleging as shown above, settlement prior to the original selection by the company and in view of the prima facie showing made by these applicants, they will in the event this decision rejecting the State's application becomes final be given an opportunity to show their right to the land.

This land is within the limits of the withdrawal ordered by the president's proclamation of November 6, 1906, for the Coeur d'Alene Forest Reserve but as it was included in the prior selection by the company it was not affected by said withdrawal.

The claims of Nystrom, Glover, Cheney, Perkins, Mandell and Theriault to the tracts in Secs. 19, 29, 31 and 35, not covered by the State's application herein considered, will be considered in the cases pending involving such tracts.

Advise the State's authorities and homestead applicants hereof. The resident attorneys for the company will be advised by this office.

Very respectfully,

W. A. RICHARDS,
Commissioner.

FEZ

There was also introduced certified copy of a letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated September 5, 1908, affirming the action of the Commissioner in rejecting the homestead application of West, which letter was marked DEFENDANTS' EXHIBIT NO. 12, which letter is reported in the Decisions of the Secretary of the Interior in Volume 37, Land Decisions, page 135.

There was also introduced as DEFENDANTS' EXHIBIT NO. 10, a certified copy of the patent of the United States to the Northern Pacific Railway Company, which EXHIBIT omitting lands described therein and not involved in this suit, is in words and figures as follows, to-wit:

Instrument Number 23932

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come,
GREETING:

WHEREAS, by the act of Congress approved July 2, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," and the joint resolution of March 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is

definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first-named act, have reported to him that the said Northern Pacific Railroad and Telegraph line, and branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the act relative thereto, and the same accepted by the President; and

Whereas, by the Act of Congress approved March 2, 1899—30 Stat., 993—authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the lands within Mount Rainier National *Part* and Pacific Forest Reserve theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey thereof, lying within any State into or through which the railroad of said company runs; and it is provided that patent shall issue to said company for lands so selected; and

Whereas, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said railroad company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

Whereas, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

Whereas, the following-described selected land has been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the act of March 2, 1899, aforesaid, and the lands given as bases therefor are within the primary limits of the Company's grant and lie opposite the constructed line of its road, and are also within the limits of the Reserves to the United States as aforesaid, to-wit:

BOISE MERIDIAN—IDAHO.

* * * * * * *

Township Forty-four North of Range Three East.

The east half of Section Twenty.

* * * * * * *

NOW KNOW YE, that the United States of America, in consideration of the premises, and pursuant to said acts of Congress, has given and granted, and by these presents does give and grant, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing.

TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns, forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized

and acknowledged by the local customs, laws and decisions of courts, and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirteenth day of October in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty-fifth.

By the President: WM. H. TAFT.

By A. S. STUMP, Assistant Secretary.

(Seal of the General Land Office) H. W. SANFORD, Recorder of the General Land Office.

Recorded: Patent Number 157733.

Recorded at the request of G. H. Plummer, Nov. 15, 1910, at 9 o'clock a. m. Stanley P. Fairweather, County Recorder. By John P. Sheehy, Deputy.

The foregoing is, pursuant to stipulation attached, approved as the abstract of the evidence offered and received at the trial of the case.

Dated March 30, 1914.

FRANK S. DIETRICH,
District Judge.

No. 552.

Filed March 30, 1914.

A. L. RICHARDSON,
Clerk.

DECISION.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decision.

July 22, 1913.

A. H. Kenyon, and Merritt, Oswald & Merritt, Attorneys for Plaintiff.

James B. Kerr, Stiles W. Burr, E. J. Cannon, and Davis, Kellogg & Severance, Attorneys for Defendants.

DIETRICH, DISTRICT JUDGE:

The plaintiff is seeking to compel the defendants to convey to him the title to the southeast quarter of section 20 in township 44 north of range 3 east of Boise Meridian, timbered land in north Idaho. His theory is that, being a settler upon the tract at the time it was surveyed, qualified to enter the same under the homestead laws of the United States, he was by the Interior Department unlawfully and without fault upon his part denied the right to make entry and procure patent thereto, and that, patent having been issued to the defendant Railway Company through a misapprehension of the law, it took the title in trust for him. The defendant Timber Company is the grantee of the Railway Company. The general rules and conditions under which courts of equity exercise jurisdiction in such cases are well understood, and do not require extended discussion. In the absence of fraud or gross mistake, decisions of the officers of the land department made within the scope of their authority upon questions of fact, or where

questions of law and of fact are inseparably commingled, cannot be reviewed by the courts. But if by manifest mistake of law these officers deprive a man of his right, a court of equity will grant appropriate relief. *Marquez* v. *Frisbie*, 101 U. S. 473; *Moore* v. *Robbins*, 96 U. S. 530; *Johnson* v. *Towsley*, 13 Wall. 72; *Bishop of Nesqually* v. *Gibbons*, 158, U. S. 156; *Johnson* v. *Drew*, 171 U. S. 94. Where, as here, the plaintiff is a private individual, he must establish his personal qualifications and his right to receive the title in controversy, for however erroneous the ruling of the land department a private individual cannot be heard to challenge it unless he has been wronged thereby; the Government alone can appear in behalf of the public interest.

The first inquiry, therefore, is whether at the time he offered his filing the plaintiff was qualified to enter public land as a homestead, and whether in due time he substantially complied or tendered compliance with the requirements of the law. The only suggestion of a personal disqualification on the part of the plaintiff is that, not at the time he offered to file upon the land, but subsequently, after he had resided thereon for a considerable period of time, he acquired and held title to more than 160 acres. But it is thought that if a settler is qualified when he takes up his residence and files upon land which is subject to entry, it is immaterial that he thereafter acquires and holds title to more than 160 acres. *Clark* v. *Mansfield* 24 L. D. 343; *Smith* v. *Longpre*, 32 L. D. 226; *Mathison* v. *Colquhoun*, 36 L. D. 82. See also *Ard* v. *Brandon*, 156 U. S. 537.

As to settlement and improvement, evidence was adduced tending to show that the plaintiff paid a small consideration to a former occupant of the land for his improvements and his prior right of possession, and thereupon took up his residence thereon in May, 1903, and that he has maintained his home there ever since that date; and that he has added to the improvements and cleared and cultivated a small

tract. In due form he applied to make homestead entry on July 17, 1905, shortly after the official survey was approved, but because of the supposed superior rights of the Railway Company his application was rejected. Substantially no evidence was offered by the defendants in rebuttal. While the amount cleared and brought under cultivation from year to year has been pathetically small, I am inclined to the view that, assuming the defendants to be without right, the plaintiff would be entitled to make final proof and receive patent. It has long been the policy of the Government to deal liberally with those who settle in good faith upon the public domain. *Ard* v. *Brandon,* 156 U. S. 537. In view of the controversy over the title, the refusal of the land department to recognize him as having any right, and the prolonged contest proceedings, it was not to be expected that the plaintiff would apply himself to the reclamation of the land with the courage and energy which would be reasonable under other circumstances. Moreover, the land is covered by a heavy growth of timber, which, because of the present want of transportation facilities, is not marketable, and therefore in clearing under the conditions which have prevailed, it has been necessary to destroy by fire timber products the proceeds of which, with a reasonable market, would, in a large part, if not wholly defray the expenses of reclamation. It is a policy of doubtful wisdom, to say the least, which would require the entryman vigorously to pursue a course attended with such great waste. The defendants urge that, in view of the inaccessability of the land, its elevation above the sea level, the climatic conditions, the outlay required to remove the stumps and brush, and the great value of the timber, it is incredible that plaintiff has ever intended in good faith to make it his home, and that, upon the other hand, it must be inferred or presumed that he seeks title only that he may profit from the value of the timber. While I recognize that the possibilities of fraud in entering such lands under

the homestead laws are great, I am unable to see how place can be given to this argument without indulging the conclusive presumption that ordinarily lands covered with a heavy growth of valuable timber are not enterable under the homestead laws—a view which would seem to be contrary to both the letter of the law and the practicable construction placed thereon by the land department. The evidence abundantly shows that, if cleared, the land is tillable and reasonably productive. The winters are rigorous, but not more so than in many places where it is well known agricultural pursuits are carried on with entire success. So far as appears, transportation facilities will be provided here, as they have been elsewhere, in due course of time. Moreover, in adjudging the good faith of the average entryman it would be a mistake to assume that he exercises the same conservative judgment that we look for in the capable and experienced man of business. The financial wisdom of the homeless, land-hungry laboring man may be sheer folly to the successful captain of industry, and in rightly discerning the motives of either we must stand with him and feel the forces by which he, and not another, is moved. While it must be admitted that the argument for the defendants is not without cogency, and is highly persuasive, in the absence of conduct upon the part of the plaintiff inconsistent with the theory of and tending to impeach his good faith, I do not feel justified in holding that, merely because there may be grave doubt whether the land, when divested of the timber, should in the exercise of sound business judgment, be regarded as desirable for agricultural purposes, he has acted in bad faith and has had no purpose to till the soil, but seeks the title only in order that he may thereby secure the valuable growth of timber. While the question is not free from doubt, upon the whole I am inclined to the view that, had the claim of the defendants not intervened, the land department would have accepted plaintiff's proof and issued patent.

Now as to the right and title of the defendants. Briefly stated, the claim of the Railway Company is that, while the lands in question were non-mineral, unreserved public lands of the United States, and prior to the inception of any right on the part of the plaintiff, on June 21, 1901, it, as the successor in interest of the Northern Pacific Railroad Company, made selection thereof under the provisions of an act of Congress entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), by filing in the United States Land Office at Coeur d'Alene, Idaho, a proper application and selection list covering this tract, together with others. The description in this list, insofar as it is pertinent here, is as follows: Land which when surveyed will be described as follows: All of Section 20, Township 44, Range 3, in the Coeur d'Alene Land District, in the State of Idaho. Conceding that such a selection list was filed upon the date mentioned, and that at that time the land was unsurveyed, non-mineral public land, the plaintiff contends that such filing was ineffective to withdraw the land from entry, for reasons which we proceed to consider.

The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, it was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the Railway Company was "the lawful successor in interest" of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to

pass upon questions of succession, and insofar as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle, already adverted to it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the Railway Company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is however, argued that as a matter of law it would be held that the Railway Company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad Company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the Railroad Company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the Railroad Company by the act of July 2, 1864, (13 Stat. 365). For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange. The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately-owned lands, to carry out its own pur-

poses, and in securing title thereto, surely it was not greatly concerned in the question to whom the consideration should be paid or what was done with it after it was paid. In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the Railroad Company rather than the Railway Company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the Railway Company had succeeded to the property rights and franchises of the Railroad Company, for but a short time prior thereto, by a proviso in the act of July 1, 1898, (30 Stat. 621; 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than of legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the Railway Company acquired all the property rights and franchises of the Railroad Company. 21 *Ops. Atty. Gen.* 486; 25 *Ops. Atty. Gen.* 401; *Ferguson* v. *Northern Pacific*, 33 L. D. 634. See also *Northern Pacific Ry. Co.* v. *United States*, 176 U. S. 706; *Northern Pacific Ry. Co.* v. *Boyd*, ... U. S. .....; 35 Sup. Ct. Rep. 554. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed, the Railroad Company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Company, and unless we hold either that by inadvertence the Rail*road* Company was named while the Rail*way* Company was intended, or that the privilege con-

ferred upon the Railroad Company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M. K. & T. Ry. Co.* v. *Kansas, Pacific Ry. Co.*, 97 U. S. 491, 497. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster* v. *Luther*, 163 U. S. 331. *Beley* vs. *Naphtaly*, 169 U. S. 353. Accordingly it is held that the Railway Company could, as a matter of law, by assignment become the successor in interest of the Railroad Company to the rights and privileges conferred by the act of 1899, and it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention.

The next objection to the validity of the Railway Company's "selection" is based upon that provision of the act which limits the right of selection to "*non-mineral* public lands, *so classified as non-mineral at the time of actual Government survey, which has been* or shall be made," etc. Precisely stated, it is that the land was not expressly classified as non-mineral by the surveyors in the field; it is not claimed that it was returned as mineral, nor is there now any question that it was in fact non-mineral. The determination of the relation which it was contemplated by Congress the surveyor's return touching the mineral character of the land should sustain to the right of selection is not free from difficulties, but doubtless the actual character of the land rather than the report thereof was the dominating consideration. *Northern Pacific Ry. Co.* vs. *United States*, 176 Fed. 706. Clearly a selection, valid for certain limited purposes at least, may be made of lands not yet classified as non-mineral, for the right of selection extends to unsurveyed lands, which in the very nature of things,

cannot be so classified. The classification called for, being modal, and therefore incidental rather than substantial, and the land in question being non-mineral in fact, it may be seriously questioned whether the plaintiff should, without showing consequent prejudice or injury to himself, be permitted to take advantage of the neglect of the administrative officers to require, in advance of the issuance of patent, a formal report of a fact about the existence of which there is no doubt. But assuming, without deciding, that under such circumstances relief may properly be granted, it must in the first place be held that the record here is insufficient to warrant a finding that the land was not returned as non-mineral; and in the second place, assuming, as contended by the plaintiff, that the return of survey contains no express classification, I am inclined to the view that under the practice prevailing in the land department, the absence of a classification as "mineral" is equivalent to, and is to be understood as, a classification of non-mineral. Undoubtedly the required report from the surveyors in the field was intended for the information of the officers of the land department, to the end that they might act intelligently and promptly in approving or rejecting applications for patents upon lands selected by the grantee. It is quite unimportant, therefore, in what manner or by what system the facts are reported from the field, provided the communication is understood in the land department. If, when a surveyor is sent out, he is instructed to note in his return all lands found to be of a mineral character as "mineral" and to make no notation at all touching lands found to be non-mineral, it cannot be said that a return made strictly in compliance with such instructions, designating some lands as mineral, and containing no notation at all as to others, fails to classify the latter group as non-mineral. The silence of the return in the one case is quite as significant as the express notation in the other. Now while it is not shown that any special instructions to this

effect were given to the surveyors in this case, it does appear that there is a well recognized custom governing the return of surveys, equivalent to such instructions. "It is the uniform custom in surveying public lands to make in the field notes and surveyor's return notation of mines, outcroppings and evidences of valuable mineral deposits where found. When, therefore, the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a non-mineral classification by the surveyor." *Davenport* v. *N. P. Ry. Co.*, 32 L. D. 28. See also *Bedal* v. *St. Paul, etc., Ry Co.*, 29 L. D. 254; *State of Idaho* v. *N. P. Ry. Co.*, 37 L. D. 135; *St. Paul, M. & M. Ry. Co.*, 34 L. D. 211; *In re N. P. Ry. Co.*, 40 L. D. 64. Accordingly, assuming the facts to be as stated by plaintiff's counsel, I must hold that the land was classified as non-mineral at the time of the survey.

The remaining contention of the plaintiff is that the selection list filed in the local land office by the Railway Company on June 21, 1901, was ineffectual because of an insufficient description of the land. The pertinent provision of the act is "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." It will be remembered that the description employed by the Railway Company was "land which when surveyed will be described as follows," and there follows a correct numbering of the section, township and range. The real question therefore is, whether under any circumstances a description of unsurveyed land by reference to the technical numbers which it will bear when surveyed designates it with "a reasonable degree of certainty." In general practice such a description is not uncommonly used, and were the plaintiff's position not fortified by the opinion of Acting

Secretary Adams in the Hyde case (40 L. D. 284) I would be inclined to the view that it has little support either in reason or the reported decisions, and, with all due respect, I am unable either to follow the reasoning or to concur in the conclusion of that case. It is true, unsurveyed land may never in fact be surveyed, and it is also true that the Government may in the future adopt a system of surveys radically different from that now in vogue. But these considerations are aside from the point. The description before us is universally understood as being equivalent to a statement that if, under the present system of public surveys, the lines thereof were actually extended, it would appear that this land is the southeast quarter of section 20, in township 44 north, range 3 east of Boise Meridian. So far as concerns the certainty of the description, therefore, it is quite unimportant whether the land is ever surveyed or not, or whether the Government retains or abandons its present system of surveys. Assuming that there are in the immediate vicinity other lands to which the public survey has already been extended, a reasonably intelligent surveyor could, with the data furnished by such a description, go into the field and identify the designated tract, and with precision define its boundaries upon the ground. The description is in effect a description by metes and bounds, with a tie to a fixed monument. To find and identify the land the surveyor selected for such purpose would, in compliance with certain familiar rules governing the making of public surveys, start from an established monument in an adjacent survey already officially approved, and, in accordance with such rules, would run certain courses and distances to reach a certain corner of the designated tract, the boundaries of which could thereupon be run out and defined upon the ground. An amplified description tying the land to such monument and giving in detail the courses and distances and the metes and bounds would have no greater precision than the one we are considering. True,

there may be some slight variation in public surveys, but that is a contingency which cannot be wholly obviated; all paper descriptions are in their application subject to a degree of uncertainty; not infrequently doubt arises in the actual location of the lines called for by an official survey. Moreover, when it comes to patent it is necessary to conform the boundaries of the claim to the boundary lines located upon the ground pursuant to such a description as we have here, less difficulty would be encountered than in adjusting those located without reference to the official survey and where the tie is to some natural object arbitrarily chosen. Indeed it is a matter of common knowledge that settlers upon unsurveyed land as a rule endeavor as best they can to conform their boundaries approximately to the projected lines of an adjacent official survey. There is an apparent assumption upon the part of the plaintiff that it was the duty of the Railway Company in some manner to mark the boundaries of its claim upon the ground, but no such duty if imposed by the act, either expressly or by reasonable implication. The requirement is that the "list" "shall describe" the land with "a reasonable degree of certainty." If to give notice of the claim it were necessary to mark the boundaries an entirely different question would be presented. But evidently it was thought by Congress that when an application was filed in the local land office containing a reasonably definite description it would constitute notice to all the world of the pendency of the claim and the status of the land included therein. I am not to be understood as holding that in all cases the description employed by the Railway Company would be reasonably certain; in any given case the degree of certainty of such description depends largely upon the degree of adjacency of surveyed land. Here the official survey had extended to adjacent townships, and I am wholly unable to understand how a list containing a detailed description by metes and bounds would have any more clearly

advised the plaintiff of the exact location of the land than did the list under consideration. But however that may be in this particular instance, it is apparent that unless the view be adopted that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain.

By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, "In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the lands shall be designated with a "reasonable degree of certainty"; the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here. In the Act of 1898 (30 Stat. 620, 621) this method of identification had been expressly sanctioned—indeed it had been prescribed to the exclusion of all others—and it is not reason-

able to believe that if, a few months later, Congress had intended to outlaw it altogether, the communication of such intention would have been left to inference or implication. The better view is thought to be that it was intended not to limit the description to any specific form, but to authorize any method which would identify the land with reasonable certainty, leaving to the Land Department the discretion to adopt such rules and regulations as, in the light of experience, might appear to be desirable. It is not doubted that, under the general language of the act, it is competent for the Department, by standing rules, to prescribe such a description as was used by the Railway Company, or a description by metes and bounds, or both. Whether such authority extends to the requirement that the boundaries be marked upon the ground is another question, which need not be decided. But when the Railway Company filed its list there were no rules or regulations upon the subject, and, as was said by Acting Secretary Pierce, in *Hanson* v. *Northern Pacific Ry. Co.*, (38 L. D. 491), where the sufficiency of this identical list was under consideration, "the practice of allowing selections by the Railway Company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations"; that is, such regulations as were promulgated by circular of November 3, 1909, (38 L. D. 287), requiring a description by metes and bounds, and a posting of notice upon the land, as well as as a reference to the projected lines of the official survey. In adopting such rules and at the same time sustaining prior selection lists not in compliance therewith, the department was not necessarily acting inconsistently. The act does not require a perfect or the best possible description, but only one having a reasonable degree of certainty. It does not follow that one form of designation is wanting in a reasonable degree of certainty because, in the light of experience,

another is adopted which for the time being is thought to be a better. Otherwise the future promulgation of still more stringent regulations would operate to invalidate selections made in strict compliance with the rules now in force. The true view is thought to be that, within the range of sound discretion, the land department is clothed with the authority to determine as a question of fact whether, under the circumstances of the case, any given designation is reasonably certain, and when fairly made within such limits such determination should not be disturbed, even though the courts may be of the opinion that greater precision is both desirable and practicable. My conclusion is that it cannot be held that, as a matter of law, such form of description as was here employed is, under any and all conditions, insufficient to designate the land with a reasonable degree of certainty, and as a question of fact there is no showing warranting a finding that, under the circumstances of this case, the Department either acted fraudulently or abused its discretion in holding the designation to be sufficient.

Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the Government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates not to the extent of the grant but only to procedure in the administration of the act, a subject which is left largely to regulation by the land department. As was said by Assistant Secretary Pierce in *State of Idaho* v. *Northern Pacific Ry. Co.*, (37 L. D. 135, 138): "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance

by the Railway Company was the most feasible method of re-acquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer." But laying aside these considerations, and applying the rule with all possible rigor, how can we construe the act so as to exclude, as a matter of law, descriptions by reference to the official survey? Clearly no such inhibition is expressed, and if implied at all it must be found in the requirement that the land be designated "with a reasonable degree of certainty." But, as we have already seen, within certain limits what is a reasonable degree of certainty in any given case is a question not of law but of fact.

In conclusion it is to be noted that the Railway Company pursued a course which, if not at the time expressly prescribed by, received the latter approval of, and all the time had the apparent sanction of usage in, the land department. The plaintiff was neither misled nor prejudiced thereby, for seemingly he had no knowledge of the existence of the list, and therefore whatever may have been the form of the description, it could not have influenced his action. The claims of a pioneer settler always appeal strongly for sympathy, but upon the most earnest consideration I am unable to grant the relief prayed for and at the same time preserve the integrity of what I understand to be the law.

From what has been said, it necessarily follows that the bill must be dismissed, and such will be the decree; each party to pay his own costs. The attorneys for the defendants may prepare form of decree.

Endorsed: Filed July 22, 1913. A. L. Richardson, Clerk.

DECREE.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

EDWARD RUTLEDGE TIMBER COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decree.

The above entitled cause having come on to be heard, the complainant appearing by his solicitors, A. H. Kenyon and Seabury Merritt, and the defendants appearing by their solicitors Edward J. Cannon, Stiles W. Burr, and James B. Kerr, and having been submitted to the court upon the pleadings therein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is, on motion of counsel for the defendants,

ORDERED, ADJUDGED AND DECREED that the bill of complaint of the complainant herein be and it is hereby dismissed for want of equity.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover costs or disbursements from the other.

By the Court:

Nov. 17, 1913. FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 17, 1913. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Assignments of Error.

Comes now the above named complainant, Andrew West, and in connection with his appeal makes the following assignments of error which he avers were committed by the court in the trial of this cause, and upon which he will rely in the prosecution of his appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The court erred in holding and deciding that the description contained in the original Selection List No. 61, made and filed by the defendant Northern Pacific Railroad Company, which described the real estate in controversy as follows:

"Land which when surveyed will be described as follows: ALL OF SECTION TWENTY (20), TOWNSHIP FORTY-FOUR (44), RANGE THREE (3), IN THE COEUR D'ALENE LAND DISTRICT IN THE STATE OF IDAHO,"

was sufficient to designate the land intended to be claimed with a reasonable degree of certainty.

II.

The court erred in holding and deciding that the real estate in controversy had been classified as land non-min-

eral in character, as provided in the Act of March 2, 1889, under which the defendant claimed.

III.

The court erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which was expressly named in the grant.

IV.

The court erred in holding and deciding that the recital in the patent that the Railway Company was "the lawful successor in interest" of the Railroad Company was binding and conclusive upon the parties.

V.

The court erred in rendering judgment against the complainant.

WHEREFORE, complainant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said court be directed to set aside the judgment heretofore rendered in favor of the defendants and enter judgment in complainant's favor; that the defendants hold the title to said real estate in trust for the complainant, and that his title thereto be quieted, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,
MERRITT, OSWALD & MERRITT,
Attorneys for Complainant, Andrew West.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Appeal and Allowance.

The above named complainant, Andrew West, conceiving himself aggrieved by the judgment entered on the 17th day of November, 1913, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and he prays that this, his appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,
SEABURY MERRITT,
Attorneys for Complainant and Appellant, Andrew West.
Old National Bank Building,
Spokane, Washington.

And now, to-wit: on the 30th day of March, 1914, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said appeal be, and it hereby is, fixed at $200.00.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS, That Andrew West, as principal, and *THE AETNA ACCIDENT AND LIABILITY COMPANY, of Hartford, Conn., a corporation of the State of Connecticut and* licenser to become sole surety on bonds in the State of Idaho, as surety, are held and firmly bound unto the above named defendants in the sum of TWO HUNDRED (200) DOLLARS, to be paid to the above named defendants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

SEALED WITH OUR SEALS and dated this 9th day of February, 1914.

WHEREAS, the above named Andrew West has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the decree rendered by the Judge of the District Court of the United States for the District of Idaho, Northern Division, in the above entitled action.

NOW, THEREFORE, the condition of this obligation is such, that if the above named Andrew West shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

ANDREW WEST, (Seal)
By A. H. Kenyon, his attorney,
Principal.

(Corporate Seal)

THE AETNA ACCIDENT AND LIABILITY COMPANY,
By Abe Wyman, Its Resident Vice President,
Therett Towles, Its Resident Assistant Secretary,
Surety.

State of Idaho,
County of Shoshone,—ss.

On this 2nd day of April, in the year Nineteen Hundred Fourteen, before me, a Notary Public, personally appeared Abe Wyman and Therett Towles, known to me to be the Resident Vice President and Resident Assistant Secretary, respectively, of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho, to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

(N. P. Seal) ADOLPH ROSSI,
Notary Public.

My commission expires Jan. 4, 1915.

Approved April 9, 1914:

DIETRICH, Judge.

Endorsed: Filed April 9, 1914. A. L. Richardson, Clerk.

PRAECIPE.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY, a Corporation,

Defendants.

Praecipe.

An appeal having been prosecuted by the complainant above named from the final decree entered herein, dismissing the bill of complaint of the complainant.

IT IS NOW STIPULATED by and between the parties hereto, by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of Bill of Complaint.

2. Copy of Answer of defendant, Northern Pacific Ry. Co.

3. Copy of Answer of defendant, Edward Rutledge Timber company.

4. Copies of the replications of the complainant to the answers of the defendants.

5. The abstract of the evidence approved by the trial court.

6. A copy of the original plat, marked Defendants' Exhibit 3, introduced in evidence in connection with the testimony of the witness, Lloyd Gilham.

7. A copy of the final decree.

8. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said court for the purposes of the appeal herein.

A. H. KENYON,
SEABURY MERRITT,
Solicitors for Complainant.
E. J. CANNON,
C. W. BUNN,
JAMES B. KERR,
Solicitors for Defendant Northern Pacific Railway Co.
STILES W. BURR,
JAMES B. KERR,
Solicitors for Defendant Edward Rutledge Timber Company.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to Edward Rutledge Timber Company, a corporation and the Northern Pacific Railway Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United

States District Court for the District of Idaho, at Boise, Idaho, wherein Andrew West is appellant and you are respondent, to show cause, if any there be, why the decree rendered against said Andrew West, appellant as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 9th day of April, 1914.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

Attest:

A. L. RICHARDSON,
Clerk of the District Court of the United States for the District of Idaho.

Service of the foregoing citation admitted and receipt of copy acknowledged this 16th day of April, 1914.

STILES W. BURR and
JAMES B. KERR,
Solicitors for Respondent
Edward Rutledge Timber Company.

C. W. BUNN,
E. J. CANNON and
JAMES B. KERR,
Solicitors for Respondent
Northern Pacific Railway Company.

Endorsed: Filed on return April 22d, 1914. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to

the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

(Seal) A. L. RICHARDSON,
Clerk.

Clerk's Certificate.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Appellant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Respondents.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 96, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with Praecipe for Transcript, on file in said cause.

Witness my hand and the seal of said court affixed at Boise, Idaho, this 30th day of April, 1914.

(Seal)

A. L. RICHARDSON,
Clerk.

No. 2416

United States

Circuit Court of Appeals

For the Ninth Circuit.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Certificate of Clerk U. S. District Court Re Cost of Record on Appeal.]

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff and Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, and NORTHERN PACIFIC RAILWAY CO.,

Defendants and Respondents.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the cost of the record on appeal, in the above-entitled cause, amounting to the sum of $151.20 has been paid by the appellant.

Witness my hand and the seal of said Court this 7th day of May, 1914.

[Seal] A. L. RICHARDSON,

Clerk U. S. District Court, District of Idaho.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court Re Cost of Record on Appeal, etc. Filed May 12, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-seventh day of October, in the year of our Lord one thousand, nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding, Honorable ERSKINE M. ROSS, Circuit Judge, Honorable CHARLES E. WOLVERTON, District Judge.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, et al.,

Appellees.

Order of Submission.

ORDERED, appeal in the above-entitled cause argued by Mr. A. H. Kenyon and Mr. Seabury Merritt, counsel for the appellant, and by Mr. James B. Kerr, and Mr. Stiles W. Burr, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of February, in the year of our Lord one thousand, nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

[Order Directing Filing of Opinion etc.]

ORDERED that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * Andrew West, Appellant, vs. Edward Ruttledge Timber Company, a Corporation, et al., Appellees. No. 2416. * * *

[Opinion U. S. Circuit Court of Appeals.]

No. 2416.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Respondents.

A. H. KENYON and SEABURY MERRITT, for Appellant.

JAMES B. KERR, STILES W. BURR, HORACE H. GLENN, CHARLES W. BUNN and CHARLES DONNELLY, for Respondents.

Before GILBERT and ROSS, Circuit Judges and WOLVERTON, District Judge.

This is a suit by Andrew West to have the defendant Edward Rutledge Timber Company declared a trustee of the title to the Southeast quarter of Section 20, Township 44 North, Range 3 East, Boise Meridian, situate in the State of Idaho, for his use. The Northern Pacific Railway Company, the successor to the Northern Pacific Railroad Company, with a view to making lieu selections in pursuance of the Act of March 2, 1899, filed in the United States Land Office at Coeur d'Alene, Idaho, on June 21, 1901, its selection list No. 61, designating for selection tracts

of land "when surveyed" to be described, among others, all of Section 20, Township 44 North, Range 3 East, Boise Meridian. Later, to wit, on July 31, 1905, the company filed its new selection list, describing the land definitely by its legal subdivisions. The plat of the Government survey of Township 44 was filed in the local land office July 17, 1905. Patent was issued by the Government October 13, 1910. The Timber Company is the successor to the Northern Pacific Railway Company. When the first selection list was filed Township 45 North, Range 3 East, the one next on the North of 44, had been surveyed and the plat filed in the local land office.

West settled upon the quarter section above described May 15, 1903, having bought out John Hanson, who had previously settled on the tract and made some improvements thereon. West continued his residence, making further improvements, and on July 17, 1905, filed in the local land office an application to make Homestead Entry of the land, which was rejected by the Register and Receiver on the ground that the Northern Pacific Railway Company had previously made selection of the same by their list No. 61, in pursuance of the Act of March 2, 1899, which rejection was subsequently approved by the Commissioner of the General Land Office, and later by the Secretary of the Interior.

The Act of March 2, 1899 (30 Stat. 993), is an act to set aside certain public lands to be known as the Mt. Rainier National Park. By Section 3 the Northern Pacific Railroad Company, upon relinquishing to

the Government lands comprised by the Park which had been theretofore granted to the Railroad Company, was authorized "to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

Section 4 provides: "That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the

local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would be settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company. "It has undoubtedly been affirmed over and over again," says the Supreme Court, "that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final." Burfenning v. Chicago, St. Paul &c. R'y., 163 U. S. 321, 323.

It would seem that the Land Department had not, prior to the time that the Railroad Company filed its first selection list, No. 61, adopted or promulgated any rules or regulations, prescribing the manner of describing lands sought to be selected by the Railway Company under the specific Act of March 2, 1899. Rules were prescribed by the Land Department relative to the selection of lieu lands by the Northern Pacific Railroad Company or its grantee, under the Act of July 1, 1898, by which it was required that "the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will

give identity to the land selected"; and, further, that "Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known land marks, so as to admit of its being readily identified when the lines of survey come to be extended." These rules were promulgated February 14, 1899 (28 L. D 103, 108).

The statute itself provides that "All selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made."

At a later date, namely, May 9, 1899, the Department promulgated another rule relating specifically to lieu selections connected with forest reserves (the act allowing such selections having been adopted June 4, 1897, 30 Stat. 36), which provides: "Every selection of unsurveyed land must designate the same according to the description by which it will be known when surveyed, if that be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended." (28 L. D. 521, 523).

The adoption of the latter rule seems to have been made necessary by a previous decision of the Land Department holding that unsurveyed as well as surveyed lands were subject to lieu selection under the Act of June 4, 1897. F. A. Hyde et al., 28 L. D. 284.

These rules were in effect, therefore, when the Railway Company made its selection No. 61, but were framed, as we have seen, with specific reference to the acts of June 4, 1897, and July 1, 1898. But by virtue of their general terms, the rules may readily have been made applicable to the selection of all unsurveyed lands.

On February 21, 1908, the Interior Department issued a circular in terms applicable to all forms of scrip, warrants, certificates, soldiers' additional homestead rights, and lieu selections, of whatever kind, which provided for the posting on the land of notice of the selection, application or entry, the same to govern on and after April 1, 1908. 36 L. D. 278.

On November 3, 1909, the Commissioner of the General Land Office, in order to remedy the confusion and uncertainty arising from applications and selections for filings and locations upon unsurveyed public lands, promulgated another rule prescribing that such selection, filing or location must contain a description of the land by meets and bounds, with courses, distances, monuments, and "the approximate description of the land, by section, township, and range, as it will appear when surveyed must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor." 38 L. D. 287.

This in the way of tracing the history of the promulgation of rules by the Land Department as it relates to describing lands in filings by entrymen and in lieu selections.

It stands to reason that none of these rules can have a retroactive effect, and persons making filings

and selections prior to their promulgation cannot be charged with their observance. Such has been the practice and ruling of the Land Department. Hanson et al., v. Northern Pacific Ry. Co., 38 L. D. 491; F. A. Hyde et al., 40 L. D. 284.

The question as to the sufficiency of a selection descriptive in terms of future survey came up in the Land Department in the Hanson case, and was determined in the affirmative. There was involved in the case the West half of the Southwest quarter, the Northeast quarter of the Southwest quarter, and the Northwest quarter of the Southeast quarter of Section 21, Township 44, a section lying alongside of the section comprising the lands in dispute here.

In a recent case, Daniels v. Northern Pacific Ry. Co., decided August 3, 1914, the Department has affirmed its holding in the Hanson case, and by express terms overrules the case of F. A. Hyde et al., *supra*, so much relied upon by counsel for plaintiff in support of the opposite view. In the Hanson case it does not appear that any proximate township or other Government line had been run at the time of making the selection, and still it was held that a selection by description in terms of future survey was sufficient. The learned Assistant Secretary who rendered the decision had cause to remark that "The practice of describing unsurveyed land in terms of a future survey thereof has been in existence for many years, and was never challenged prior to the decision of F. A. Hyde et al., sup."

From the foregoing it not only appears that the practice of describing lands for entry or selection in

terms of future survey has been sanctioned by the rules and regulations of the Land Department and its decisions, but by statute, though it has latterly been considered the better practice to require a more particular description. Thus we are thrown back to the primary inquiry, whether the description contained in the Railway Company's selection designates the tract with a reasonable degree of certainty, notwithstanding the practice and decisions of the Land Department. The decisions of the Land Department as to its own authority are entitled to respect and are persuasive; but if the Department has exceeded its power its acts are *coram non judice* and void. Of course, when the law has declared what is a sufficient description it must be held to be controlling.

That Congress, as it did by the Act of July 1, 1898, and that the Land Department, as it did by its earlier rules and regulations, and its rulings and decisions, should have regarded a description in terms of future survey as sufficient is strongly persuasive of its legal sufficiency.

It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another. Every one is

presumed to know the method by which the Government surveys are made, and what is meant by township and range, and what by section and quarter section, or other legal subdivisions, and the relation of one township to another and of one section with its subdivisions to another. So that, for instance, if Township 2 North is surveyed, and a tract is described as Section 1 in Township 1 North, there could be no question that the tract was designated with a reasonable degree of certainty. It would be the section immediately south of surveyed Section 36 in Township 2 North. It is a maxim that that is certain which can be made certain, and its application would make the result perfectly manifest. Section 1 in that case would be tied directly to fixed monuments, to wit, the Southeast corner of Township 2, and the Southeast and Southwest corners of Section 36 in that Township. To designate signifies "To mark out or indicate by visible lines, marks, description, name, or something known and determinate." Century Dictionary. A description by legal subdivision is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying adjoining a subdivision already surveyed, is also a perfectly intelligible description; and any one at all familiar with the Government surveys could not be mistaken as to what was meant by the designation, and would be ready to locate the premises. Such a description would be absolutely good in a contract or deed, and would convey title.

Now, if we move away a step farther from the

established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back or a tying back to Section 36, Township 1 North. But the farther the remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until evenutally no reasonable being could expect another to tie back to a known survey for the purpose of identification.

Section 20, the tract designed to be selected by the Railway Company, is situate 3 miles south of Section 32 in Township 45, a surveyed township, and could be readily located from such survey, although in a rough country. So that one could not widely mistake the premises on the ground. In fact, Olaf Edin, who helped run the exterior lines of the West claim in 1901, says: "We undertook to tie them up to the Government lines which had already been run as near as we could." The selection list was filed in the local land office, and this was notice to all parties that the Railway Company claimed the land, if its designation of the tract was legally sufficient.

The purpose of the statute was not that the selector should so describe the land as that the Government could make its patent by such description, for it contemplates that the land shall be described anew when surveyed by legal subdivisions, and that the patent shall carry that description. An exact description is therefore unimportant, but the applicant must designate the tract designed to be selected with a

reasonable degree of certainty. The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey and thus to correct the description in the primary selection. By reasonable intendment, therefore, we are impressed that the description contained in the Railway Company's list No. 61, under the conditions prevailing of the survey of Township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law.

It is urged that Congress must have intended a more particular description than one in terms of future survey by reason of the use of different language in denoting the manner of description in the act of March 2, 1899, from that employed in the act of July 1, 1898. But if this be true as a general rule, nevertheless, for the reasons above stated, the description in the present case in terms of future survey, under the conditions existing, designates the land sought to be selected with a reasonable degree of certainty.

That being the single question urged here for our decision, the decree of the District Court is affirmed with costs to the respondents.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Opinion.

Filed Feb. 15, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Andrew

West, vs. Edward Rutledge Timber Company, a Corporation et al., Decree. Filed and Entered Feb. 15, 1915. F. D. Monckton, Clerk.

[Petition for Appeal to the Supreme Court from the Circuit Court of Appeals, Ninth Circuit.]

Number 2416.

ANDREW WEST,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY.

The above-named appellant, Andrew West, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 15th day of February, A. D. 1915, affirming the decree of the District Court of the United States for the Northern Division of the District of Idaho, and that the matter in controversy in said suit exceeds $1,000, besides costs; that this cause is not one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction, and that it is proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals from the Ninth Circuit to send the record and

proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by the said applicant may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

A. H. KENYON,
SEABURY MERRITT, and
S. M. STOCKSLAGER,
Attorneys for West, Appellant.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed September 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. Petition for Appeal to the Supreme Court from the Circuit Court of Appeals, Ninth Circuit. Andrew West, Plaintiff, vs. Edward Rutledge Timber Co., and Northern Pacific Railway Co. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Assignment of Errors.]

United States Circuit Court of Appeals, Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY et al.,

Appellee.

The appellant in the above-entitled cause, in connection with his petition for appeal herein, presents and files herewith his Assignment of Errors, as to which matters and things he says the decree entered herein on the 15th day of February, 1915, is erroneous, to wit:

1.

The tract of land involved having been unsurveyed at the date of the claimed selection by the Northern Pacific Railroad Company, the grantor of the appellee company, under the act of March 2, 1899, the description of the tract in the selection in the terms of a future survey, when made, the Court erred in adjudging and decreeing that the description contained in the original selection list No. 61 was sufficient to designate the land intended to be claimed with a reasonable degree of certainty.

1½

That the Court erred in holding and deciding that the Northern Pacific Railway Company was the suc-

cessor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which last-named company was expressly named in the grant, there being no evidence upon that fact in the case.

II.

The Court erred in holding and decreeing that such a description was notice and was sufficient to protect the selector against the rights of the appellant acquired by his settlement, residence, cultivation and improvement of the tract under the provisions of the homestead law made prior to the survey and continued thereafter, without any notice whatever of the selection.

III.

The Court erred in adjudging that the survey of Twp. 45 N. R. 3 East, the one next on the north of 44, prior to the filing of the selection list, added anything to the certainty of this void description or aided in any way in making it certain, for the reason, among others, that by statute, all surveys are made from the South and East as was that of the Twp. in which the lands involved are situated, throwing the lots on the north and west of the Twp.

IV.

The Court erred in holding that notwithstanding the entire failure of the surveyor to classify the lands involved as nonmineral at the time of the actual Government survey, as required by the Act of March 3, 1899, they were subject to selection thereunder.

V.

The Court erred in holding that as the land involved was classified as mineral by the Commis-

sioners appointed under the Act of Feby. 26, 1895, entitled "An Act to Provide for the Examination and Classification of Certain Mineral Lands in the State of Montana and Idaho" and this classification approved by the Secretary of the Interior and the records made to conform to such classification prior to the date of the selection, it was subject to selection under the Act of March 2, 1899, which specifically required that the land to be selected should be nonmineral, and so classified.

VI.

The Court erred in not holding that as the land selected in this case had been classified as mineral under said Act, and as the selection was made by the Northern Pacific Ry. Co., it was made the duty of the Secretary of the Interior by the terms and provisions of the law to "reject, cancel and disallow" it.

VII.

The Act of March 2, 1899, being a private grant or exchange, contractual and complete in itself, constitutes a private option and a selection thereunder a private contract requiring strict construction; for this reason alone, none of the circulars quoted by the Court, based upon public acts, or acts in behalf of settlers, which are entitled to a liberal construction, are applicable, and the Court erred in applying them in this case.

VIII.

The Circuit Court of Appeals after holding that prior to the selection the Department had not adopted or promulgated any rules or regulations prescribing the manner of describing lands sought to

be selected by the railway company under the specific Act of March 2, 1899, erred in adjudging that the Circular of Feby. 14, 1899, under the Act of July 1, 1898, was applicable in the construction of the Act at bar, for the reason, among others, as held and decided by the Interior Department, September 5, 1908 (37 L. D. 135), that the two statutes had no common purpose, and further holding, that this Circular was issued prior to the passage of the Act of March 2, 1899.

IX.

The Court also erred in adjudging that the Circular of May 8, 1899, under the Act of June 4, 1897 (28 L. D. 521), was applicable to the Act of March 2, 1899, for the reason, as held by the Department Sept, 5, 1908, *supra,* the Act of March 2, 1899, being contractual in character and complete in itself, it should be construed independently of other statutes having a different purpose. Moreover, this Circular was revoked by the Department December 18, 1899, (29 L. D. 394), a date prior to the date of the selection, and another Circular substituted which required publication and posting on the land when unsurveyed, neither of which was done by the company in this case.

X.

The Court erred in not adjudging and deciding that appellee had no right to the land and that it should be decreed to hold as trustee of appellant and be required to convey the legal title to him.

Wherefore the appellant prays that said decrees may be reversed and the appellant may have an ad-

judication and decree in his favor as herein specified.

A. H. KENYON,
SEABURY MERRITT, and
S. M. STOCKSLAGER,
Attys. for Appellant.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed September 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. United States Court of Appeals, Ninth Circuit. Andrew West,, Appellant, vs. Edward Rutledge Timber Company et al., Appellee. Assignment of Errors. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

Appeal and Allowance to the Supreme Court of the United States from the Circuit Court of Appeals, Ninth Circuit.

No. 2416.

ANDREW WEST,
Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

APPEAL AND ALLOWANCE.

The above-named appellant, conceiving himself

aggrieved by the decree entered on the 15th day of February, 1915, in the above-entitled cause, doth hereby appeal from said decree to the Supreme Court of the United States, and he prays that this, his appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

A. H. KENYON,
SEABURY MERRITT,
Old National Bank Building, Spokane, Washington.

and

S. M. STOCKSLAGER,
McGill Building, Washington, D. C.,
Attorneys for Appellant Andrew West.

Now, on this 14th day of September, 1915, IT IS ORDERED, that the appeal in the foregoing cause be allowed as prayed for, and that the amount of the bond on said appeal be, and it hereby is, fixed at $500.00.

WM. W. MORROW,
U. S. Circuit Judge, and Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond on Appeal. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. Appeal and Allowance to the Supreme Court of the United States from the Circuit Court of Appeals, Ninth Circuit. Andrew

West, Appellant, vs. Edward Rutledge Timber Co., a Corporation, and Northern Pacific Railway Co., a Corporation, Appellee. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy. Clerk.

THE AETNA
ACCIDENT AND LIABILITY
COMPANY.
HARTFORD, CONNECTICUT.
MORGAN G. BULKELEY
PRESIDENT.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Andrew West, Appellant above named, as principal, and THE AETNA ACCIDENT AND LIABILITY COMPANY, of Hartford, Connecticut, a corporation of the State of Connecticut, and licensed to become sole surety on bonds in the

States of Washington and California, as surety, are held and firmly bound unto the above-named Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a Corporation, in the penal sum of FIVE HUNDRED DOLLRS ($500.00), to be paid to the said parties, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 10th day of September, 1915.

WHEREAS, the above-named Andrew West has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit, by the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named Andrew West shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the

same shall be and remain in full force and virtue.

ANDREW WEST. [Seal]
By A. H. KENYON,
His Attorney,
Principal.

THE AETNA ACCIDENT AND LIABILITY COMPANY,
By C. T. HANSEN,
Its Resident Vice-President.

[Seal] By F. W. MADDUX,
Its Resident Assistant Secretary,
Surety.

State of Washington,
County of Spokane,—ss.

On this 10th day of September, in the year Nineteen Hundred and Fifteen, before me, a Notary Public, personally appeared C. T. Hansen and F. W. Maddux, known to me to be the Resident Vice-president and Resident Assistant Secretary, respectively, of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioners of the States of Washington and California, to transact a surety business in said States, and is authorized by the laws of said

States to become sole surety upon bonds.

[Seal] A. J. ROE,
Notary Public.

The foregoing bond is approved this 14th day of September, 1915.

WM. W. MORROW,
U. S. Circuit Judge, and Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Aetna Life Insurance Company. Casualty Insurance. Surety Bonds. The Aetna Accident & Liability Co. Hartford, Conn. $500.00. On Behalf of Andrew West, in Favor of Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation. Bond on Appeal.

No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees

To the Clerk of said Court:

Sir: Please make and issue a certified Printed Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, the record to consist of a copy of the following:

1. Printed Transcript of Record on which the above-entitled cause was heard in said Circuit Court of Appeals;

2. Certificate of Clerk U. S. District Court Re Cost of Record on Appeal, etc., filed May 12, 1914;

3. Order, entered October 27, 1914, of submission;

4. Order, entered February 15, 1915, directing filing of opinion, etc.;

5. Opinion, filed February 15, 1915;

6. Decree, filed and entered February 15, 1915;

7. Petition for, and Order Allowing Appeal to Supreme Court U. S.;

8. Assignment of Errors on said appeal;
9. Bond on said appeal;
10. This Praecipe, and
11. Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on said Appeal;
12. Original Citation on said appeal.

Please prepare 25 uncertified printed copies of said Transcript of the Record on Appeal by printing 25 copies of the above-mentioned proceedings that were had, and papers that were filed in said cause in said Circuit Court of Appeals (items 2–12, *supra*), and by binding one of the latter printed copies of said proceedings, etc., at the end of each of the 25 extra copies of the printed record on which said cause was heard in said Circuit Court of Appeals.

A. H. KENYON,
SEABURY MERRITT,
S. M. STOCKSLAGER,
Counsel for Appellant.

Service acknowledged Sept. 10, '15.

EDWARD CANNON,
STILES W. BURR,
JOS. B. KERR,
Counsel for Appellees.

[Endorsed]: Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Andrew West, Appel-

lant, vs. Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees,

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-eight (128) pages, numbered from and including 1 to and including 128, to be a true copy of the complete record made pursuant to the praecipe filed by counsel for the appellant on the 14th day of September, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case; including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on appeal to the Supreme Court of the

United States in the above-entitled cause as made and certified pursuant to the said praecipe.

ATTEST my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-fifth day of October, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

(Canceled U. S. Internal Revenue 10-cent Documentary Stamp.)

[Citation on Appeal to Supreme Court U. S.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

United States of America,—ss.

To Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees:

You, and each of you, are hereby admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, the District of Columbia, on the 13th day of November, A. D., 1915, pursuant to an order allowing an appeal filed and entered in the clerk's office for the United States Circuit Court of Appeals for the Ninth Circuit from a final decree signed, filed and entered on the 15th day of February, 1915, in that certain suit, being in equity, No. 2416, wherein Andrew West is complainant and appellant and you are defendants and appellees, to show cause, if any there be, why the decree rendered against said appellant, as in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM W. MORROW, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, this 14th day of September, 1915, and of the Independence of the United States the one hundred and fortieth.

WM. W. MORROW,

One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Received copy and acknowledged service of the within copy this 4th day of October, 1915.

_____,

_____,

_____,

_____,

Solicitor for Defendant and Appellee, Edward Rutledge Timber Company, a Corporation.

_____,

_____,

_____,

_____,

CHARLES W. BUNN,

EDWARD J. CANNON,

Solicitors for Defendant and Appellee, Northern Pacific Railway Company.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

United States of America,—ss.

We hereby accept service and acknowledge receipt of a true copy of the original Citation on Appeal issued in the above-entitled cause on the 14th day of September, 1915, hereto attached, this 16th day of October, 1915.

STILES W. BURR,

Solicitor for Defendant and Appellee, Edward Rutledge Timber Company, a Corporation.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed Sept. ——, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

[Endorsed]: No. 2416. United States Circuit Court of Appeals, for the Ninth Circuit. Andrew West, Appellant, vs. Edward Rutledge Timber Companw, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees. Citation on Appeal. Filed Oct. 22, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.